14-1150

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

CENTER FOR REGULATORY REASONABLENESS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of Respondent Agency's Promulgations and Approvals of Effluent Limitations and Other Limitations

---

PETITIONER'S MOTION TO HAVE COURT CONSIDER ADDITIONAL ARGUMENT AND SUPPLEMENT THE APPENDIX BASED ON NEW EVIDENCE

Oral argument requested but not yet scheduled

JOHN C. HALL
D.C. Cir. #44296
GARY B. COHEN
D.C. Cir. #49377
PHILIP D. ROSENMAN
D.C. Cir. #55525
Hall & Associates
Attorneys for Petitioner
1620 I Street, NW, Suite 701
Washington, DC 20006
Telephone: (202) 463-1166

June 15, 2016

I. INTRODUCTION

Petitioner, Center for Regulatory Reasonableness ("CRR"), respectfully submits this Motion seeking to (1) supplement its Appendix based on newly-disclosed Respondent records that directly address merits issues, and (2) supply the Court with additional argument regarding this previously undisclosed information. This motion is filed pursuant to good cause and the inherent authority of this Court – a court of original jurisdiction – to assure fairness in the proceeding and avoid undue prejudice to the parties before it. *See e.g., Fund for Animals v. Williams,* 245 F.Supp.2d 49, 55 (D.D.C. 2003) (an agency may not exclude pertinent but unfavorable information from an administrative record). Based on communication with counsel for Respondent, United States Environmental Protection Agency ("EPA" or "the Agency"), it has been ascertained that EPA opposes this Motion.[1]

These previously-withheld and/or newly-released EPA records are central to this case, as they directly address several hotly-contested issues. As discussed in more detail herein, the new evidence consists of (1) records confirming that EPA, in fact, rendered and transmitted (to its Regional offices and delegated states) a decision to only require compliance with the *ILOC* ruling inside the Eighth Circuit and to continue to implement the vacated rule amendments outside the Eighth Circuit, and (2) EPA filings in other courts arguing that, *inter alia*, circuit court

[1] EPA also declined a request to submit these records to the Court and correct its prior filings given the new information.

decisions rendered under 33 U.S.C. § 1369(b)(1)(E), CWA § 509(b)(1)(E) – including the *ILOC* ruling – are binding in all circuits nationwide and the *ILOC* ruling was properly decided. This new evidence expressly contradicts the factual averments and legal arguments made by EPA to this Court on these issues.

Importantly, CRR was unaware of this new evidence when it filed its earlier briefs with this Court because (a) it was in EPA's exclusive control since it was created, (b) its existence was not disclosed to CRR (despite repeated requests for such information), or (c) it was just recently-created. EPA should not derive a benefit from hiding key decision making records from the Court.[2] As CRR has been unreasonably deprived of the opportunity to address this critical information in its prior filings to the Court, both justice and fairness support its consideration at this time. Accordingly, based on good cause, CRR respectfully requests the Court to admit CRR's Supplemental Appendix that accompanies this filing and accept supplemental briefing, provided herein, in conjunction with the new evidence and those arguments already addressed in prior filings.

[2] *See, e.g., Bowen v. New York*, 476 U.S. 467, 481 (1986) *citing City of New York v. Heckler*, 742 F.2d 729, 738 (2nd Cir. 1984) (citations omitted) (finding that the government's arguments for dismissal could not prevail on account of "secretive conduct" and "clandestine policy" that were "uncovered only in the course of [] litigation").

II. BACKGROUND

A. Court's Prior Ruling to Defer Record Issues Until Merits Briefing

On January 26, 2015, EPA filed its certified index of the administrative record. *See* Doc. No. 1534203. In response, CRR filed a series of challenges to this record. *See* Doc. Nos. 1535311, 1539097, 1543125, 1545887. On June 8, 2015, the Court issued an Order instructing CRR to re-raise these concerns during merits briefing and include supplemental material in its briefs. *See* Doc No. 1556265. This filing is consistent with the Court's prior Order, which determined that all records/appendix issues would be resolved in merits briefing.

B. Post-Briefing Release of New Information

On March 21, 2016, CRR filed its Reply Brief. *See* Doc. No. 1604987. Since that time, CRR has continued to pursue the release of Agency records addressing EPA's decision to limit the effect of the *ILOC* decision. Despite repeated EPA Headquarters FOIA responses denying the existence of such records, on May 25, 2016, EPA Region VII[3] finally revealed and released, for the first time, a document known as "the November 19, 2013 EPAHQ Desk Statement" (hereinafter "EPAHQ Desk Statement") and various other EPA documents confirming the dissemination of the EPAHQ Desk Statement to EPA's Regional

[3] EPA Headquarters has yet to release the EPAHQ Desk Statement despite outstanding FOIA requests for these records.

Offices and the delegated state programs.[4] The EPAHQ Desk Statement provides the following post-*ILOC* permitting directive to the Regional permitting staffs:

> *The Eighth Circuit's interpretation* in Iowa League of Cities v. EPA *of EPA's regulations relating to blending and bypass is legally binding* within the Eighth Circuit. Outside the Eighth Circuit *EPA will continue* … [to use] *the agency's existing interpretation of the regulations*.

See Supp. Appx., Ex. 66, EPAHQ Desk Statement (emphasis added). The documentation released by EPA Region VII also confirmed that (1) Headquarters discussed this Desk Statement with each of the ten Regional Branch Chiefs on November 21, 2013 (Supp. Appx., Ex. 67, Minutes from November 21, 2013 Branch Chief Call); (2) Headquarters circulated the Desk Statement to each of the ten Regional Offices on November 22, 2013, (Supp. Appx., Ex. 68, Email circulating EPAHQ Desk Statement nationwide); and (3) the Regional Offices, in turn, transmitted the document to the delegated state agencies. *See* Supp. Appx., Ex. 69, Region VII email circulating EPAHQ Desk Statement to all RVII states).

Based on these new records, the factual timeline governing this petition now reveals an affirmative, internal EPA decision to nonacquiesce to the *ILOC* ruling

[4] To be sure, CRR's delayed awareness of these documents was no fault of its own. Since the *ILOC* ruling, CRR, by and through its attorneys, Hall & Associates ("H&A"), has submitted several FOIA requests with EPA seeking the Agency's implementation of the ruling (*e.g.*, guidance, statements of policy, decision documents). *See* Ex. 70, Carlesco Declaration, at ¶5. EPA, however, has never identified the existence of the Desk Statement, even though the document unquestionably was responsive to such requests. *Id.*

and to continue to impose the vacated rule modifications outside of the Eighth Circuit. *See* Supp. Appx., Ex. 71, Updated timeline of EPA's actions post-*ILOC*. Contrary to EPA's averments, the EPA decision being challenged is reflected by far more evidence than the April 2, 2014 and June 18, 2014 EPA letters appended to CRR's Petition. Those letters were simply the written confirmation of EPA's earlier, internal decision not to be bound by the *ILOC* ruling outside the Eighth Circuit.

Similarly, CRR only recently became aware of EPA's litigation positions presented to the United States District Court for the District of North Dakota ("D.N.D.") in *State of North Dakota v. EPA*, Case No. 3:15-cv-00059-RRE-ARS. *See* Supp. Appx., Ex. 72, EPA's D.N.D. filing. In that case, EPA sought dismissal of a challenge to EPA's controversial "waters of the United States" (WOTUS) rule. The central issues addressed by EPA's motion were the precedential effect of CWA § 509(b)(1) decisions, the timing/location of regulatory challenges thereunder, and the CWA objective of national uniformity.

EPA's motion asserted that, in light of the Sixth Circuit's decision of *Murray Energy Corp. v. United States DOD (In re United States DOD)*, 817 F.3d 261, 2016 U.S. App. LEXIS 3031 (6th Cir. Feb. 22, 2016), dismissal of the D.N.D. matter was required because, *inter alia*, Congress had altered the judicial review scheme to ensure Section 509(b)(1)(E) decisions are binding nationwide, thereby

promoting national uniformity in NPDES permitting rules – allowing only one appellate court review and decision in such matters.[5] As a result of EPA's filing, the D.N.D. stayed proceedings pending the Sixth Circuit's resolution of jurisdiction and further decisions regarding validity of the rule. Given the diametrically opposed statutory interpretations propounded by EPA in the two matters (*infra*, at 14-20), this Court should take judicial notice of EPA's contrary filing.

III. ARGUMENT

A. The Administrative Record Necessarily Includes the Newly Released Documents

It is axiomatic that the record before a reviewing court "is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). In seeking to prevent CRR from supplementing EPA's paper-thin administrative record, the Agency previously claimed the following:

> The letters do not address, *and EPA has not elsewhere decided, whether and to what extent the Agency will follow Iowa League outside the Eighth Circuit*. [*See* Doc. Document #1537684, EPA's Opposition to Petitioner's Motion to Supplement the Administrative Record , at 15 (emphasis added); *see also Id.*, at 17]

[5] Although the EPA brief to the D.N.D. pre-dates CRR's Reply Brief in this matter by a couple of weeks, CRR did not learn of the filing until reading an April 18, 2016 *InsideEPA* article which reported the occurrence.

> The Center cannot expand the record simply by claiming that EPA made a decision -- *a decision that the Agency denies making* …. [*Id.*, at 16 (emphasis added)]

The EPAHQ Desk Statement and related documents confirm that these EPA denials of a decision regarding adherence to the *ILOC* ruling outside of the Eighth Circuit are patently false. Specifically, the EPAHQ Desk Statement reveals that, in November 2013, EPA rendered and disseminated a decision to treat the *ILOC* ruling as binding only inside the Eighth Circuit, and to continue implementing the vacated rule amendments outside the Eighth Circuit. The accompanying documents show that, as was true in the *ILOC* case, EPA communicated its "marching orders" via conference call and email, seeking to limit the paper trail of the decision. *See* Pet. Appx., Ex. 19, at ¶¶5, 14, 17 (IDNR Declaration) (Appx., at 125-131); *see ILOC*, 711 F.3d at 860.

This EPAHQ Desk Statement was, in fact, the decision reported in the trade press articles and announced by EPA at the various regulatory meetings. *See* CRR Appx., Exs. 43-45 (Appx., at 293-295, 310-313). In turn, it was these announcements that triggered the November 26, 2013 municipal group letter to Nancy Stoner, Acting Assistant Administrator of the Office of Water (*See* CRR Pet., at Ex. C), and EPA's responses which acknowledge "disagreement" regarding the Agency's course of action. *See* CRR Petition for Review, Exs. A-B. EPA's failure to disclose this EPAHQ Desk Statement and the accompanying

documentation showing its nationwide distribution to permit staff, as part of the administrative record is simply indefensible.[6]

The fact that EPA undertook considerable efforts to hide its working law raises serious issues of candor and illuminates a purposeful decision to shield this "secret law" from judicial review. *Supra*, at n.4 (Carlesco Declaration); *see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (noting a strong Congressional aversion to agency "secret law"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977) (an agency may not give a "fictional account" of its record). As the clear manifestation of EPA's post-*ILOC* permitting decision making process is now known, it necessarily must be part of the "full record" on review. *Supra*, at 6 (*Overton Park*).

B. <u>The New Evidence Warrants Supplemental Briefing</u>

The new evidence directly refutes factual assertions made by EPA to this Court and reveals that EPA's legal arguments in this case are facially inconsistent

[6] Agency "marching orders" are integral when unlawful rulemaking has been alleged. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023-1024 (D.C. Cir. 2000) (finding jurisdiction where EPA supplied the regulated community with "marching orders" that "command," "order," "dictate," or "require"); *accord Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-252 (D.C. Cir. 2014) ("An agency action that sets forth legally binding requirements for a private party to obtain a permit or license is a legislative rule."); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 477-480 (2001) (finding an Agency implementation policy to be a reviewable final action under the Clean Air Act's "preenforcement" judicial review provision that is similar to CWA Section 509).

with the Agency's statutory interpretation of CWA § 509(b)(1) used to defend the WOTUS rule. Given this information, the Court should find (1) that EPA rendered a decision to only be bound by the *ILOC* ruling inside the Eighth Circuit and continue implementation of the vacated NPDES rule amendments outside of the Eighth Circuit, and (2) that such a decision exceeded EPA's statutory authority under CWA § 509(b)(1)(E).

1. *The new evidence further confirms EPA rendered a final decision that has binding effect on CRR's members*

In an effort to convince the Court that there has been no reviewable final Agency action, EPA's Response Brief asserts that the Agency has not made any decision regarding the binding nature (or lack thereof) of the *ILOC* ruling outside of the Eighth Circuit:

> To date, EPA's statements do not reflect any definitive position on the application of *Iowa League* outside the Eighth Circuit. [*See* Document #1597116, Brief for Respondent, at 17].
>
> EPA did not resolve or address whether and to what extent Agency officials may on a case-by-case basis, outside the Eighth Circuit, follow *Iowa League*. [*Id.*, at 23].
>
> Finality is also lacking because EPA has not made the decision the Center alleges that it has made. [*Id., at 24*].
>
> But neither in the challenged letters nor elsewhere has EPA completed any decision-making as to whether and to what extent to follow Iowa League outside the Eighth Circuit. [*Id., at 24*].
>
> Because EPA has not decided whether and to what extent to apply *Iowa League* outside the Eighth Circuit or what positions it will apply

> there concerning blending, secondary treatment, or bacteria mixing zones, *see supra* pp. 24-30, the Center cannot demonstrate [standing]. [*Id.*, at 33-34].

Similarly, EPA disavowed ever providing its Regional Offices or delegated state agencies with instructions or directives as to how to address NPDES permits in light of the *ILOC* ruling:

> The Center similarly assumes that another FOIA-withheld document … contains an intra-EPA "directive" not to follow *Iowa League* outside the Eighth Circuit and to apply the Act or its regulations in those states in a manner inconsistent with *Iowa League*. That assumption is unsupported. *No such directive issued*. [*Id.*, at 27 (internal record citations omitted) (emphasis added)].
>
> The Center's reliance on *Nat'l Envtl. Dev. Ass'n Clean Air Project ("NEDACAP") v. EPA*, 752 F.3d 999 (D.C. Cir. 2014), is misplaced. There, EPA transmitted throughout the Agency a memorandum that "announce[d] a new enforcement regime in response to [a] Sixth Circuit[] decision." 752 F.3d at 1007. *EPA announced nothing of the sort here*. [*Id.*, at n.7 (emphasis added)].
>
> After receiving EPA's recommendations, the state agency wrote what appears to be its understanding that 'EPA has determined that [*Iowa League*] is only applicable in the 8th Circuit.' Any such understanding is incorrect, and in fact the only cited source for it is EPA's recommendations, which said nothing about *Iowa League*. EPA's recommendations merely restated the requirements of 40 C.F.R. § 122.41(m). Thus, *the state agency's comments are not reasonably attributable to EPA*, and they do not support the Center. [*Id.*, at n.10 (internal record citations omitted) (emphasis added)].

The newly-released Agency records confirm each of these EPA averments are patently false. The recently-obtained EPAHQ Desk Statement, on its face, announces EPA's decision to only be bound by the *ILOC* decision within the

Eighth Circuit and that, outside the Eighth Circuit, permit writers should continue to use "the agency's existing interpretation." *Supra*, at 4. The EPAHQ Desk Statement was created by EPA Headquarters, sent to all of EPA's Regional Offices on November 22, 2013, and unquestionably specifies that different NPDES rule interpretations apply depending upon the location of the permittee (*i.e.*, inside versus outside the Eighth Circuit).[7] *Id.* Moreover, EPA Headquarters held a conference call to discuss the Desk Statement and *ILOC* implementation with Regional Office permitting staff and, thereafter, the Regional Offices informed state officials of EPA's *ILOC* decision. *Id.*

Given the express language of the EPAHQ Desk Statement and its subsequent release to all regional and state regulatory personnel, it is difficult to understand how legal counsel could have – in good faith – argued that EPA has not rendered and disseminated the decision at issue in this matter. *Supra*, at 6, 9, 10. Regardless, the new documentation, along with other documentation already proffered by CRR, confirms that EPA made a decision that the *ILOC* ruling *is not binding outside of the Eighth Circuit* and communicated that decision *as marching orders* to federal and state permitting officials. This fact pattern mirrors that in *Nat'l Envtl. Dev. Ass'n Clean Air Project (NEDACAP) v. EPA*, 752 F.3d 999 (D.C.

[7] This is virtually the same position EPA Headquarters announced at the November 13, 2013 4-States Meeting and the November 20, 2013 NACWA Legal Affairs Conference. *See* CRR Appx., Exs. 43-45 (Appx., at 293-295, 310-313).

Cir. 2014), where an EPA directive to limit a circuit court Clean Air Act ruling was vacated as unlawful. *See* Doc. No. 1579912, CRR Brief, at 22, 32. The only difference is, in this case, EPA has sought to hide the regulatory decision document from the public and the Court.

Accordingly, the Court should grant CRR's Petition for Review given that EPA clearly rendered a decision to continue to apply the vacated rule amendments outside of the Eighth Circuit and to only be bound by the *ILOC* ruling in the Eighth Circuit. That Agency decision, which radically alters three major NPDES rules without rulemaking, and now creates a non-uniform NPDES permitting program, is substantively and procedurally infirm for the reasons previously briefed. *See* CRR's Opening Brief, at 45-58.

2. New evidence confirms EPA agrees with CRR's reading of CWA § 509(b)(1)(E) and Congress' goal of national uniformity

As noted above (*supra*, at 5-6), EPA has espoused inconsistent interpretations regarding CWA § 509(b)(1)(E) to another federal court. Accordingly, this Court should take judicial notice of EPA's contrary statements. *See Vince v. Mabus*, 956 F.Supp.2d 83, 88 (D.D.C. 2013) (courts are free to take judicial notice of the information found in "public records from other proceedings."); *see also Rimkus v. Islamic Republic of Iran*, 750 F.Supp.2d 163, 171 (D.D.C. 2010) (finding scope of judicial notice "extends to judicial notice of court records in related proceedings").

Moreover, given that the D.N.D. stayed its matter based on EPA's filing, EPA should be estopped from asserting inconsistent arguments in this case. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (The purpose of the equitable doctrine of judicial estoppel is to "protect the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment."); *United States v. Kellogg Brown & Root Servs.*, 284 F.R.D. 22, 39, 2012 U.S. Dist. LEXIS 124010, *50, 2012 WL 3776708 (D.D.C. 2012) ("Through application of judicial estoppel, this Court could preclude the Government from interpreting the force protection clause in a way contrary to its earlier position."); *see also* 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4477 (1981 & Supp. 1990), at 782 ("a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.").[8] As the issue-by-issue comparison below reveals, EPA's legal arguments to the D.N.D. regarding CWA §

[8] At a minimum, EPA's inconsistent arguments with respect to these legal issues should eliminate any deference the Agency is otherwise afforded. *See Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (U.S. 2012) (no deference to agency when interpretation appears to be a "post hoc rationalization" or a "convenient litigating position"); *see also Cuyahoga Metro. Hous. Auth. v. U.S.*, 65 Fed. Cl. 534, 551 (Fed. Cl. 2005) ("[A]ny claim to deference here is severely diminished not only because the agency has never formally promulgated its views, but also because it has periodically shifted its position, employing at least three different formulations within the last twenty years."); *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993) ("The consistency of an agency's position is a factor in assessing the weight that position is due").

509(b)(1)(E) and related prudential considerations confirm that CRR's view of the Act is correct.

a. EPA confirms that CWA § 509(b)(1)(E) rulings are binding nationwide

On the merits, the critical issue before this Court is whether EPA may nonacquiesce to a Circuit Court ruling under CWA § 509(b)(1)(E). EPA's argument to this Court is summarized by a title in its brief:

> **Even if the Court reaches the merits, the Center incorrectly contends that the Clean Water Act requires EPA to follow *Iowa League* outside the Eighth Circuit.**

See Doc. 1597116, EPA Resp. Brief, at 37 (emphasis in original). Consistent with this title, EPA argues that neither the CWA nor 28 U.S.C. § 2112(a) requires it to follow an earlier circuit court § 509(b)(1)(E) decision on the validity or proper interpretation of a rule:

> The Center's primary argument, that federal law requires EPA to follow a decision like *Iowa League* nationally, is baseless. Agencies generally have an option of invoking the doctrine of intercircuit nonacquiescence, and federal courts generally are not bound by the decision of a different circuit. Although Congress has altered those principles in certain circumstances, in neither the Act nor 28 U.S.C. § 2112(a) did Congress do so in the context of a decision like *Iowa League*, which involved a single petitioner; letters to a lawmaker that were never intended to promulgate any kind of rule; and a dubious determination of jurisdiction by the reviewing court.

Id., at 18-19.

However, just as CRR argued in this petition, EPA informs the D.N.D. that

only a single, nationally applicable decision of a specific Agency action is allowed under CWA § 509(b)(1)(E):

> *The legislative history of CWA Section 509(b)(1)* and 28 U.S.C. § 2112(a) further demonstrates that *Congress intended that actions reviewable under Section 509(b)(1) be subject to judicial review in a single, consolidated proceeding*. [*See* Supp. Appx., Ex. 72, EPA's D.N.D. filing, at 11 (emphasis added)].
>
> *The Agencies are bound nationwide* by the Sixth Circuit's decisions, win or lose, absent reversal by the Supreme Court. The same is true with respect to all other parties to the Sixth Circuit proceeding, including the plaintiff States here. Any other result would render CWA Section 509(b)(1) and 28 U.S.C. § 2112(a) a nullity. [*Id.*, at 12 (emphasis added)].

These restrictions would apply whether multiple challenges are filed at the same time or, as EPA now espouses, petitioners are forced to file sequential actions because EPA refuses to honor the first circuit court ruling. EPA's contrary arguments to this Court are directly refuted by the clear statutory language and legislative history cited by EPA in the D.N.D filing.

b. EPA agrees with CRR that national uniformity is a primary objective of the CWA regulatory scheme

EPA's filings to this Court dismissed CRR's arguments that NPDES permitting regulations must be nationally uniform:

> Contrary to the Center's contention, Congress did not alter default principles through the 'CWA's central objective of national uniformity of baseline requirements (e.g., technology-based rules and NPDES rules).' . . . . Although the petitioner asserted, and the Eighth Circuit agreed, that the letters contained legislative rules, it does not

> follow that *Iowa League* must be binding throughout the United States to align with the objective of uniform baseline requirements.

EPA Response Brief, at 41-42. Yet, in its filing to the D.N.D., EPA champions the Congressional intent of national uniformity in NPDES regulations as an additional reason why § 509(b)(1)(E) decisions are to be binding nationwide:

> In providing in Section 2112 for consolidation of multiple petitions for review *of the same agency action* in a single circuit, Congress determined that the interests in judicial economy, prompt resolution, *and national uniformity override the interest in fostering multi-circuit development of the law*. It follows that *Congress intended* that the judgment reached by the reviewing court *as to that particular agency action be treated as binding nationwide*. Indeed, little purpose would be served by consolidation if the judgment reached by the designated circuit were not nationally applicable as to the action under review.

See Supp. Appx., Ex. 72, EPA's D.N.D. filing, at 11. Elsewhere, EPA stated:

> Congress clearly expressed its objective of uniformity by centralizing multi-circuit petitions for review of agency action in a single circuit.

Id. at 13. EPA's double-speak on this issue should not be accepted by this Court. National uniformity is plainly an overriding objective of the CWA that is effectuated by the judicial review provision – CWA § 509(b)(1)(E) – that only allows one Court to review the validity of a specific Agency regulatory action – informal, formal, or otherwise.

c. EPA's North Dakota filing argues the inappropriateness of "waiting until permitting" in CWA § 509(b)(1)(E) challenges

In this case, EPA seeks to avoid judicial review of its rule modifications by arguing that: "[u]nless and until EPA renders a decision in conjunction with a

discharge permit or other case-specific context, judicial review is premature." EPA Resp. Brief, at 18. Furthermore, EPA argues:

> Deferring judicial review until EPA renders a final permit decision that actually aggrieves or imminently threatens to injure a member of the Center would result in issues being teed up on the basis of a concrete dispute and fully-developed administrative record.

Id., at 36.[9]

In sharp contrast, EPA informs the D.N.D. that the Act is structured to promote prompt resolution of the legality of any new NPDES permitting standard, as such action is "critical" to effectuate the CWA intent:

> But with respect to the Clean Water Rule and similar comprehensive and permit-centric regulations issued by EPA, it is *critical* that courts give effect to *the congressional goal of ensuring prompt resolution of challenges to EPA's actions* . . . . As the Sixth Circuit recognized, to rule that Congress intended to provide direct circuit court review of individual permitting actions but intended to exclude from such review the definitional Rule on which the process is based, would produce, per E.I. du Pont, a truly perverse situation.

See Supp. Appx., Ex. 72, EPA's D.N.D. filing, at 11 (emphasis added) (internal citations and quotations omitted).[10]

---

[9] *See also id.*, at 30. ("Only if EPA takes final action in issuing or denying a discharge permit, either as the original permitting authority or as a result of EPA's having objected to a proposed state-issued permit, could any discharger be forced not to blend. Of course, at the conclusion of any such permit proceeding, the affected permittee will have full rights to judicial review of any *actual* regulatory decision reflected in the final permit.").

[10] Citing *E.I. DuPont de Nemours Co. v. Train*, 430 U.S. 112 (1977), EPA's D.N.D. filing points out that:

The Agency further acknowledges that failure to obtain immediate review of the regulatory action under 33 U.S.C. § 1369 results in waiver of that right:

> EPA actions with respect to which review could have been obtained under Section 509(b)(1) shall not be subject to judicial review in any civil or criminal proceeding for enforcement. Section 509(b) thereby promotes, *inter alia*, the ability of regulators, the regulated community, and the public to rely on the validity of EPA regulations that are not promptly challenged or are upheld by a court of appeals.

See Supp. Appx., Ex. 72, EPA's D.N.D. filing, at 3-4 (internal citations and quotations omitted).[11] As such, EPA acknowledges that CRR's facial challenges to EPA's nonacquiescence decision and re-promulgation of the legislative rules vacated by *ILOC* (*e.g.*, lack of notice and comment rulemaking, in excess of statutory authority) must be brought immediately in advance of permitting. EPA's contrary arguments to this Court are a transparent attempt to avoid judicial review, in direct conflict with the structure of the Act.

> [T]he Court stressed a pragmatic interest in determining the extent of that jurisdiction: the power to review individual permit decisions necessarily encompasses the power to review the basic rules that control those decisions.

Id., at n.9.

[11] In its Reply Brief, CRR supplied the Court with EPA's OGC opinion that rendered the same conclusion. *See* Doc. No. 1604987, CRR Reply Brief, at 17.

d. Although EPA disparages the *ILOC* ruling in this matter, EPA acclaims it in its North Dakota filing

EPA's arguments regarding *ILOC* to this Court are encapsulated by the title to its discussion: "**The Center's fallback argument fails because *Iowa League* was incorrectly decided.**" EPA Response Brief, at 42 (emphasis in original). EPA then rattles off a list of reasons why, in its opinion, *ILOC* was improperly decided:

> There are ample grounds for EPA or this Court to disagree with *Iowa League* and reach opposite conclusions.

Id., at 43. In contrast, EPA's filing to the D.N.D. repeatedly cited to *ILOC* favorably. *See* Supp. Appx., Ex. 72, EPA's D.N.D. filing, at 20, 21, 24, 27, 28. In particular, EPA favorably cites *ILOC* for its pragmatic and inclusive definition of "effluent limitation" or "other limitation" under CWA § 509(b)(1)(E):

> In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), the court of appeals explained that EPA's statements regarding the use of blending is an 'other limitation' because, as in *VEPCO*, it restricts the discretion of municipal sewer treatment plants in structuring their facilities. The Eighth Circuit further observed that many of our sister circuits have adopted the *VEPCO* approach, by construing CWA Section 509(b)(1)(E) to apply to rules that restrict the discretion of dischargers.

Id., at 20 (internal citations and quotations omitted). EPA then analogizes the WOTUS rule to the circumstances in *ILOC*:

> To the contrary, consistent with the Eighth Circuit's interpretation of that provision in *Iowa League of Cities*, and the Sixth Circuit's conclusion, by defining what waters require permits for discharges of pollutants, the regulatory definition of waters of the United States—including the Clean Water Rule—qualifies as an "other limitation."

Id., at 21.

EPA's critique of the *ILOC* decision to this Court is a far cry from its repeated reliance and praise of the decision to the D.N.D. While EPA will undoubtedly attempt to rationalize its shifting views of the decision, EPA has obviously been modifying its opinion of the decision for litigation convenience. Such duplicity with regard to the validity of *ILOC*, along with all of EPA's other irreconcilable legal arguments made to this Court, should not be tolerated. *Supra*, at 12-13 (*New Hampshire v. Maine, U.S. v. Kellogg Brown & Root Services*).

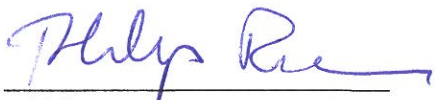
In conclusion, the CWA establishes a uniform system of rules applicable to NPDES permittees and provides for a judicial review process that also ensures national uniformity. On these issues, EPA has plainly supplied this Court with statutory interpretations and arguments that are inconsistent with the express purpose and intent of the CWA regulatory scheme as evidenced by EPA's own filings in other courts. Therefore, judicial estoppel should be invoked to protect the integrity of the judicial process that EPA seeks to abuse to its own ends.

IV. CONCLUSION

WHEREFORE, for all of the aforementioned reasons, Petitioner requests that this Court grant Petitioner's Motion, consider Petitioner's additional arguments, and admit Petitioner's Supplemental Appendix based on the new evidence just recently disclosed to Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2016, I caused a copy of **Petitioner's Motion to Have Court Consider Additional Argument and Supplement the Appendix Based on New Evidence** to be served on all registered counsel in *Center for Regulatory Reasonableness v. United States Environmental Protection Agency*, (D.C. Cir. No. 14-1150) via the D.C. Circuit's CM/ECF system.



Philip D. Rosenman, Esq.

Attorney for Petitioner
Counsel for the Center for Regulatory Reasonableness

14-1150

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

CENTER FOR REGULATORY REASONABLENESS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of Respondent Agency's Promulgations and Approvals of Effluent Limitations and Other Limitations

---

PETITIONER'S SECOND SUPPLEMENTAL APPENDIX

Oral Argument requested but not yet scheduled

JOHN C. HALL
GARY B. COHEN
PHILIP D. ROSENMAN
Hall & Associates
Attorneys for Petitioner
1620 I Street, NW, Suite 701
Washington, DC 20006
Telephone: (202) 463-1166
Facsimile: (202) 463-4207

June 15, 2016

INDEX TO PETITIONER'S SECOND SUPPLEMENTAL APPENDIX

* - Denotes documents that were not included in EPA's Index to the Administrative Record.

Iowa League of Cities v EPA

Desk Statement

November 19, 2013

Statement:

The Eighth Circuit's interpretation in Iowa League of Cities v EPA of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

NPDES Branch Chief Call
November 21, 2013
Minutes

Attending:

Region 2. Kate Anderson, Michele Josilo
Region 3. Brian Trulear
Region 4. Mark Nuhfer, Chris Thomas
Region 6. Claudia Hosch
Region 7. Glenn Curtis, Amy Shields, Mike Jay
Region 8. Colleen Rathbone
Region 9. Dave Smith, Elizabeth Sablad
Region 10. Mike Lidgard
HQ: Ross Brennan, Karen Metchis
On phone: Kevin Weiss

(b)(5) DPP, Non-responsive

[redacted]

4. Kevin Weiss: Blending/Iowa League of Cities: See attached desk statement.

Non-responsive, (b)(5) DPP

[redacted]

(b)(5) DPP, Non-responsive

(b)(5) DPP, Non-responsive

From: Weiss, Kevin
To: Webster, David; Anderson, Kate; Trulear, Brian; MacKnight, Evelyn; Thomas, Chris; Nuhfer, Mark; Pierard, Kevin; Wiemhoff, John; Kaspar, Paul; Schwab, Kay; Curtis, Glenn; Nix, Tanya; Dunn, John; Hosch, Claudia; Rathbone, Colleen; Sablad, Elizabeth; Smith, DavidW; Lidgard, Michael; Poulsom, Susan; Pitt, Brian; Angelich, Michelle
Cc: Bosma, Connie
Subject: Desk Statement for Iowa League of Cities
Date: Friday, November 22, 2013 2:21:23 PM
Attachments: Desk Statement 11-19-13.docx

From: Curtis, Glenn
To: Dunn, John
Subject: Re: Draft Agenda R7 Water Director"s Conference call December 11th 9-11 AM: (b) (6)
Date: Tuesday, December 10, 2013 1:41:20 PM

Karen should lead. But if not ..sure. All of this , down the agenda, should move quick, as an update, not a lot of discussion. We can talk

From: Dunn, John
Sent: Tuesday, December 10, 2013 10:58:55 AM
To: Curtis, Glenn
Cc: Jay, Michael
Subject: FW: Draft Agenda R7 Water Director's Conference call December 11th 9-11 AM: Call in No: (b) (6)

Glenn, Somehow you got missed on this one.

I will sit in for you. Do I just read the desk statement on 8th Circuit? Do want other things on the table? --JD

From: Mindrup, Mary
Sent: Tuesday, December 10, 2013 9:26 AM
To: Dunn, John
Subject: FW: Draft Agenda R7 Water Director's Conference call December 11th 9-11 AM: Call in No: (b) (6)

Mary A T Mindrup
Chief, Drinking Water Management Branch
Water, Wetlands, and Pesticides Division
US Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, KS 66219
913-551-7431

From: Jay, Michael
Sent: Friday, December 06, 2013 3:23 PM
To: mtate@kdheks.gov; adam.schnieders@dnr.iowa.gov; shelli.grapp@dnr.iowa.gov; John.Madras@dnr.mo.gov; chris.wieberg@dnr.mo.gov; john.hoke@dnr.mo.gov; pat.rice@nebraska.gov; steve.goans@nebraska.gov; marty.link@nebraska.gov
Cc: Shields, Amy; Flournoy, Karen; Bowman, Janet; Thomas, Hattie; Huffman, Diane; Delashmit, John; Mindrup, Mary; Flournoy, Karen; Kovac, Steve; Green, Jamie; Nix, Tanya; Humphrey, Leslie
Subject: Draft Agenda R7 Water Director's Conference call December 11th 9-11 AM: Call in No: (b) (6)

All,

We put this together based on the feedback you provided to Glenn. Any more suggestions be sure to let us know, thanks !

EPA – Federal Update:

1. EPA budget in general, what we know

2. The latest on 8th Circuit decision and EPAs next step. See HQ Desk Statement below

   Iowa League of Cities v EPA, Desk Statement, November 19, 2013
   The Eighth Circuit's interpretation in Iowa League of Cities v EPA of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

3. EPA Draft 2014-2018 Strategic Plan Update

4. Waters of the US Rule Status Update

   It was noted that earlier EPA had acknowledged that the WoUS guidance/rule would be an expansion of the current universe. Now the press (Energy Guardian) reports AA Stoner indicated the following:

   Stoner reiterated EPA's stance that the proposal will comply with Supreme Court rulings that required the agency to reduce the scope of waters subject to agency permitting.
   She said the plan, developed with the U.S. Army Corps of Engineers, "means that EPA's jurisdiction will only include the protection of the same waters that have historically been covered under the Clean Water Act for the past 40 years – in fact, it will be a smaller set of waters than before the Supreme Court decision,"

5. What is the status of Water AA appointment? Any insight on Kopocis?

6. The latest Climate Change Initiative : EPA (read ahead http://epa.gov/climatechange/impacts-adaptation/fed-programs/EPA-impl-plans.html)

EPA and States Open Discussion:

1. State Budgets Future Outlook

   How much do states rely on SRF Admin $? What would be the plan if the House-published CWSRF cut of 83% and PWSRF cut of 62%; or the President's 20% and 7.5% cuts, respectively, took place?

14-1150

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

CENTER FOR REGULATORY REASONABLENESS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

DECLARATION OF ADAM S. CARLESCO IN SUPPORT OF PETITIONER'S MOTION TO HAVE COURT CONSIDER ADDITIONAL ARGUMENT AND SUPPLEMENT THE APPENDIX BASED ON NEW EVIDENCE

1. I, Adam S. Carlesco, am a junior attorney for Hall & Associates, have worked on this matter, and am a member in good standing with the Minnesota bar association. I graduated law school from The George Washington University Law School and have practiced law since March 2015. Serving as an associate attorney, I have worked on Center for Regulatory Reasonableness (CRRs) matters since April 2015.

2. I submit this Declaration in support of CRR's Motion to have Court Consider Additional Argument and Supplement the Appendix Based on New Evidence. I have personal knowledge of the matters stated in this Declaration, and if called upon to do so, I am competent to testify to all matters set forth herein.

3. EPA's November 19, 2013 EPA HQ Desk Statement was not publicly available document. I sought out a copy of this Desk Statement through extensive internet searches using a number of popular search engines, including Google, Yahoo, and Bing. No record of the EPA

HQ Desk Statement was disclosed through this search.

4. To the best of my knowledge and internet searching, EPA's Desk Statement concerning the applicability of *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) to permitting decision making in states outside of the Eighth Circuit is not available to the public in any format readily accessible to interested parties; either provided by EPA or through re-publications by interested parties or non-deep web media.

5. I am also familiar with and was responsible for drafting a number of FOIA requests submitted to EPA Headquarters and various Regional Offices regarding EPA's post-*Iowa League of Cities* decision making and permitting. Hall & Associates has, for the past two and a half years, repeatedly requested that EPA produce any documents developed by EPA Headquarters that provided guidance to the EPA Regional Offices on how to conduct permitting following the *Iowa League of Cities* decision. Attached are a number of FOIA requests and EPA responses, spanning December 2, 2013 to January 7, 2016. (Atts. A to G). These FOIA requests, in plain English sought:

> December 2, 2013 – "Any notifications given to the Regional offices from EPA Headquarters regarding the agency's aforementioned decision to only apply the *Iowa League of Cities* decision in the 8th Circuit". (Att. A)
>
> March 18, 2015 – Records "regarding communications to, from, or within EPA R2 concerning whether or not … [EPA] has decided that the decision in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), does not apply outside of the 8th Circuit…" (Att. E)
>
> January 7, 2016 – "All records transmitting, referencing, or discussing the content and applicability of the November 5, 2013 [*ILOC* applicability] memorandum. Such records

would include all correspondences from state permitting agencies, permittees, other EPA regions, or EPA Headquarters." (Att. F)

None of EPA Headquarters FOIA responses (Atts. B, D, G) identified the November 19, 2013 "EPA HQ Desk Statement" as a document (publicly available or otherwise) that was responsive to the numerous FOIA requests that sought the information contained within the statement. In fact, EPA repeatedly denied, under FOIA, possessing any records that provided post-*Iowa League of Cities* permitting guidance to the Regional Offices. The latest such denial was issued by Deborah Nagle on April 11, 2016. (Att. H).

I declare under penalty of perjury of the laws of the District of Columbia that the foregoing is true and correct to the best of my knowledge and belief.

Dated: June 14, 2016

Adam S. Carlesco
Attorney for Plaintiff
HALL & ASSOCIATES
1620 I St., NW
Washington, DC 20006-4033
(202) 463-1166
acarlesco@hall-associates.com

HALL & ASSOCIATES

Suite 701
1620 I Street, NW
Washington, DC 20006-4033
Telephone: (202) 463-1166 Web: http://www.hall-associates.com Fax: (202) 463-4207

Reply to E-mail:
jhall@hall-associates.com

December 2, 2013

USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Mail Code: 4203M
Washington, D.C. 20460

RE: Freedom of Information Act Request for Records Associated with *Iowa League of Cities v. EPA* decision- Amended Request

Dear Mr. Weiss:

On November 21, 2013, EPA requested written assurance for payment regarding FOIA requests submitted by H&A on October 25, 2013, to Headquarters and to the ten EPA regional offices for records associated with the *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013). As Nancy Stoner, EPA Acting Assistant Administrator for Water, has announced EPA's position that the *Iowa League of Cities* decision only applies in the 8th Circuit (i.e., the Agency will not being applying the decision nationwide), H&A would like to modify and narrow the October 25, 2013, FOIA requests as follows.

Please provide only the following records:

1. Any legal or regulatory analysis or briefing materials prepared in support of the agency's decision to only apply the *Iowa League of Cities* decision in the 8th Circuit;
2. Any notifications given to the Regional offices from EPA Headquarters regarding the agency's aforementioned decision to only apply the *Iowa League of Cities* decision in the 8th Circuit; and,
3. Any documents explaining how peak flow processing (also known as "blending") and bacteria mixing zones for CSO and stormwater discharges will be addressed in permitting and enforcement actions within the 8th Circuit versus outside of the 8th circuit.

As previously stated in the original FOIA request, for purposes of this request, the definition of "records" includes, but is not limited to, documents, letters, memoranda, notes, and e-mail

messages sent by EPA personnel from EPA accounts and any private accounts regarding EPA matters. Additionally, please contact the undersigned if the associated search and duplication costs are anticipated to exceed $250.00. Please duplicate the records that are responsive to this request and send them to the undersigned at the above address. If any requested records are withheld based upon any asserted privilege, please identify the basis for the non-disclosure. If the Agency lacks records responsible to a particular item, please note that in the response.

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that agency resources are conserved and only the necessary documents are reproduced.

Sincerely,

/s/ John C. Hall
JOHN C. HALL

HALL & ASSOCIATES

Suite 701
1620 I Street, NW
Washington, DC 20006-4033
Telephone: (202) 463-1166 Web: http://www.hall-associates.com Fax: (202) 463-4207

Reply to E-mail:
jhall@hall-associates.com

October 25, 2013

VIA ONLINE FOIA SYSTEM

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (2822T)
Washington, D.C. 20460
E-mail: **hq.foia@epa.gov**

RE: Freedom of Information Act Request for Records Associated with Iowa League of Cities v. EPA decision

To Whom This May Concern:

This is a request for public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the Environmental Protection Agency ("EPA") at 40 C.F.R. Part 2. For purposes of this request, the definition of "records" includes, but is not limited to, documents, letters, memoranda, notes, and e-mail messages sent by EPA personnel from EPA accounts and any private accounts regarding EPA matters.

On March 25, 2013, the Court of Appeals for the Eighth Circuit issued a decision in the *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) vacating the mixing zone rule contained in the June 2011 letter and the blending rule contained in the September 2011 letter. The court held that the bacteria mixing zone prohibition in primary contact recreation waters "eviscerate[d] state discretion" to utilize such mixing zones and, therefore, constituted a revised rule that did not go through proper rulemaking procedures. *Id.* at 874. Additionally, the court found EPA's blending prohibition was both procedurally and substantively improper as it was "irreconcilable with both the secondary treatment rule and the bypass rule" (*id.* at 875) and "exceeds EPA's statutory authority" under the CWA. *Id.* at 877.

This request seeks any records containing the following:

1. Any communication between EPA Headquarters and EPA Regional offices discussing the impact of the *Iowa League of Cities* decision on permitting and enforcement actions;

2. Any communication between EPA Regional offices and state entities discussing whether the *Iowa League of Cities* decision should be or should not be followed in future regulatory actions; and,
3. Any EPA legal or regulatory analysis regarding the effect of the *Iowa League of Cities* decision including whether the decision will be followed by all EPA Regions nationwide.

Please contact the undersigned if the associated search and duplication costs are anticipated to exceed $250.00. Please duplicate the records that are responsive to this request and send them to the undersigned at the above address. If any requested records are withheld based upon any asserted privilege, please identify the basis for the non-disclosure. If the Agency lacks records responsible to a particular item, please note that in the response.

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that agency resources are conserved and only the necessary documents are reproduced.

Sincerely,

/s/ John C. Hall
JOHN C. HALL

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 24 2013

OFFICE OF WATER

Mr. John Hall
Hall & Associates
1101 15th Street, NW, Suite 203
Washington, D.C. 20005-5004

Re: Freedom of Information Act Request EPA-HQ-2014-000552

Dear Mr. Hall:

This is an interim, partial response to your Freedom of Information Act request of October 25, 2013. On December 2, 2013, you modified your request to provide only the following records:

1. Any legal or regulatory analysis or briefing materials prepared in support of the agency's decision to only apply the *Iowa League of Cities* decision in the 8th Circuit;

2. Any notifications given to the Regional offices from EPA Headquarters regarding the agency's aforementioned decision to only apply the Iowa League of Cities decision in the 8th Circuit; and

3. Any documents explaining how peak flow processing (also known as "blending") and bacteria mixing zones for CSO and stormwater discharges will be addressed in permitting and enforcement actions within the 8th Circuit versus outside of the 8th Circuit.

On December 11, 2013, you further clarified that you limited the request to documents residing at or prepared by EPA Headquarters or used by EPA Headquarters to render its decision. In response, I am enclosing the following documents which are responsive to your request:

1. Slide from powerpoint presentation "NPDES Litigation Update", dated July 2013

2. Speaker notes for presentation "NPDES Litigation Update," dated July 2013.

3. Email from Kevin Weiss to Richard Witt, subject "FW: Region 7: WEF / 4 States Meeting Agenda," dated October 28, 2013.

4. Email from Kevin Weiss to Glenn Curtis, subject "Desk statement for adverse decision in a Clean Water Act case," dated March 27, 2013.

5. Desk Statement on Iowa League of Cities CWA decision, dated March 26, 2013.

6. Email from Kevin Weiss to Glenn Curtis, subject "BioAciq," dated April 4, 2013.

We are unable to provide the following documents which have been determined to be exempt from mandatory disclosure by either the deliberative process privilege of 5 U.S.C. 552(b)(5) as pre-decisional, deliberative, and confidential or the under the investigatory records compiled for law enforcement purposes privilege of 5 U.S.C. 552(b)(7).

1. Working draft of paper entitled "How Should EPA Interpret the *Iowa League* decision?" This is an undated draft document prepared by Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

2. Working draft of paper entitled "Issue: Should EPA recommend that DoJ petition the Supreme Court for writ of certiorari to overturn the Eighth Circuit's decision in *Iowa League of Cities*?" dated August 10, 2013. This is a draft document prepared by Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

3. Working draft of paper entitled "Iowa League of Cities v. EPA," undated. This is a draft document prepared by Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

4. Working draft of paper entitled "Options for interpreting the *Iowa League* decision within the Eighth Circuit," undated. This is a draft document prepared by Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

5. Working draft of paper entitled "Options for clarifying the Impact of Iowa League of Cities," dated October 30, 2013. This is a draft document prepared by Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

6. Working draft of paper entitled "Scope of the Iowa League of Cities Decision", dated July 19, 2013. This is a draft document prepared by Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

7. Working draft memorandum, From Andrew Sawyers to Regional Water Permits Division Directions, Regions 1-10, subject "Applicability of *Iowa League* decision to EPA permitting determinations," dated November 5, 2013. This is a draft document prepared by Headquarters employees. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

8. Working draft memorandum "EPA's regulatory approach following the 8th Circuit's *Iowa League of Cities decision*" dated September 17, 2013. This is a draft document prepared by Headquarters employees. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

9. Working draft of paper "Potential Response to Iowa League," undated. This is a draft document prepared by Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

10. Memorandum from Alexis P. Anderson, legal intern to Joanna Citron Day, RE: *Iowa League of Cities v. EPA*, dated November 21, 2013. This is a draft document prepared by Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

11. Working draft of paper entitled "How Should We Answer the Actiflo Question?" This is an undated draft document prepared by Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

12. Working draft of paper entitled "Option 1", dated September 9, 2013. This is a draft document prepared by Headquarters employees discussing a potential option. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

13. Working draft of paper entitled "Option 2" dated September 9, 2013. This is a draft document prepared by Headquarters employees discussing a potential option. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

14. Working draft of paper entitled "Options for Interpreting Iowa League of Cities decision," undated. This is a draft document prepared by Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

15. Email from Joanna Day to James Vinch, subject "memo from my legal intern", dated November 25, 2013. This is an email chain involving EPA Headquarters employees discussing options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

16. Email from Carol DeMarco to Joseph Theis, subject "PVSC and blending (PLEASE READ)", dated November 20, 2013. This is an email chain involving EPA Headquarters employees discussing litigation specific matters. This document is withheld under the investigatory records compiled for law enforcement purposes privilege of 5 U.S.C. 552(B)(7) and the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential. DoJ case

17. Email from Loren Denton to James Vinch, subject "Enforcement Cases Affected by Iowa League", dated October 30, 2013. This is an email chain involving EPA Headquarters employees discussing litigation specific matters. This document is withheld under the investigatory records compiled for law enforcement purposes privilege of 5 U.S.C. 552(B)(7) and the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

18. Email from Leslie Allen to Alan Morrissey, subject "various Gary/Region 5 memos" dated October 30, 2013. This is an email chain involving Department of Justice and EPA Headquarters employees discussing potential options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

19. Email from Loren Denton to James Vinch, subject "Decision 711_F_3d_844.rtf; Iowa League of Cities Briefing 9-26-13 v4.docx" dated September 26, 2013. This is an email chain involving EPA Headquarters employees discussing options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

20. Email from Kevin Weiss to James Vinch, subject "Revised Q&A", dated September 26, 2013. This is an email chain involving EPA Headquarters employees discussing options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

21. Email from Kevin Weiss to James Vinch, subject "Follow up on Iowa League of Cities discussion", dated August 28, 2013. This is an email chain involving EPA Headquarters employees discussing options. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5) as pre-decisional, deliberative, and confidential.

We continue to search and review materials to determine which materials may be released and which will be withheld. You do not need to appeal EPA's decision to withhold documents at this time. You will receive administrative appeal rights at the time you receive the completed response and may appeal all of the withholdings at that time.

The cost of responding to the FOIA to date is $1,015.75. An itemized invoice covering the charges for processing your request to date is enclosed. Please forward your check or money order, made payable to the U.S. Environmental Protection Agency, within 30 days of the date of this response. Your check should refer to the FOIA number above and should be accompanied by the top portion of the enclosed Bill for Collection. Your prompt payment of the amount indicated will be appreciated. If we determine that there will be additional costs for responding to the FOIA, we will request a written assurance of payment for the additional amount.

Again, this is an interim, partial response to your request. At this time, the EPA estimates the Agency will be able to complete this response, along with a description of your appeal rights, by January 31, 2014. Please contact me at (202) 564-1185 if you have any questions regarding our response.

Sincerely,

Deborah G. Nagle, Director
Water Permits Division

Enclosures

NPDES Litigation Update

Louis Eby
Kevin Weiss
Erin Flannery Keith
Office of Wastewater Management, Water Permits Division

Permit Writers' Conference

July 2013

HALL & ASSOCIATES

Suite 701
1620 I Street, NW
Washington, DC 20006-4033
Telephone: (202) 463-1166 Web: http://www.hall-associates.com Fax: (202) 463-4207

Reply to E-mail:
jhall@hall-associates.com

January 14, 2014

USEPA Headquarters/FOIA Office
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Mail Code: 4203M
Washington, D.C. 20460

RE: Freedom of Information Act Request EPA-HQ-2014-000552

Dear Ms. Nagle:

After reviewing the Agency's partial response to Hall & Associates ("H&A") dated December 24, 2013 ("Partial Response"), it is clear the Agency conducted the wrong assessment. On November 13, 2013, EPA informed the public that the Iowa League of Cities decision did not apply outside the 8th Circuit. In our December 2, 2013, modified request, we asked the Agency to provide *only* the following records:

1. Any legal or regulatory analysis or briefing materials prepared in support of the *agency's decision* to only apply the *Iowa League of Cities* decision in the 8th Circuit;
2. Any notifications given to the Regional offices from EPA Headquarters regarding the agency's aforementioned decision to only apply the *Iowa League of Cities* decision in the 8th Circuit; and,
3. Any documents explaining how peak flow processing (also known as "blending") and bacteria mixing zones for CSO and stormwater discharges will be addressed in permitting and enforcement actions within the 8th Circuit versus outside of the 8th circuit.

None of the documents provided by the Agency in its Partial Response or withheld as pre-decisional are responsive to H&A's FOIA request for records supporting EPA's decision to apply the *Iowa League of Cities* decision only in the 8th Circuit. The first two documents related to a powerpoint presentation entitled "NPDES Litigation Update," simply summarized the Court's decision and do not pertain to the final decision rendered by the Agency (*i.e.*, part 1 of the request). The emails provided state that the Region will be discussing the decision at a meeting and that no new agency statements regarding the decision have been released. Once

again, these provide no notification of when the Agency's decision was actually made (*i.e.*, part 2 of the request) on how to implement the decision (*i.e.*, part 3 of the request). Finally, the desk statement summarizes the decision and provides one open-ended statement that the Agency is "reviewing the decision and discussing potential next steps with the Department of Justice." It is especially confusing as to why the Agency provided the desk statement as the document was released the day after the decision was issued and therefore, could not possibly (and does not) provide the insight into the Agency's position that the decision only applies in the 8th Circuit as announced by Nancy Stoner, EPA Acting Assistant Administrator for Water, on November 13, 2013. Regardless, none of the documents provided by the Agency in its Partial Response are responsive to H&As FOIA request nor is it apparent that the documents withheld were related to the actual request.

Moreover, EPA has charged H&A a fee of $1,015.75 for conducting a search and review of records which clearly do not respond to H&As FOIA request. H&A is more than willing to pay for the Agency's review, as evidenced by the payment assurance given by H&A, so long as the review is for the records *actually* requested by H&A. Here, clearly, that is not the case and H&A will not pay the Agency for a non-responsive, frivolous response.

Finally, there is no such thing under FOIA as a "partial response." The request is overdue and the documents requested must be produced if they exist. As EPA's action is not responsive to H&As FOIA request, please provide the records that are responsive to H&As FOIA request (*i.e.*, records related to EPA's decision to implement the *Iowa League of Cities* decision only in the 8th Circuit). If the Agency does not promptly identify the requested documents by the latest January 31, 2014, when it said it would be releasing the remaining responsive documents, then we will be forced to take this matter into court given the circumstances. If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that agency resources are conserved and only the necessary documents are reproduced.

Sincerely,

/s/ John C. Hall
JOHN C. HALL

Cc: Kevin Weiss

"Internal-Not for Distribution – This is not a Press-Release"

Decision by US Court of Appeals for the Eighth Circuit: Iowa League of Cities v. EPA

We understand that the typical course of action where press inquiries involve or affect matters pending before a court is for EPA press officers to coordinate with their counterparts at DOJ and, in accordance with DOJ's standard practice, to decline to comment on matters in litigation. However, in OGC's judgment this event may generate some interest from the press, so this information is being provided as background should EPA receive any questions.

Desk Statement

On March 25, 2013, the U.S. Court of Appeals for the Eighth Circuit vacated portions of two letters that EPA sent to Senator Charles Grassley on June 30, 2011 and September 14, 2011, regarding certain requirements under the Clean Water Act (CWA). The Court found that the June 30 letter included a new mixing zone rule for waters designated for primary contact recreation issued in violation of the requirements of Administrative Procedures Act (APA). With regard to the September 14 letter, the Court found that it included a new rule that unlawfully applied the bypass regulations to certain flows at POTWs diverted from secondary ("biological") treatment to other treatment units during wet weather conditions, that was issued in violation of both the APA and CWA. EPA is currently reviewing the Court's decision.

Background

Both EPA letters were sent by Nancy Stoner, Assistant Administrator for Water, to Senator Grassley of Iowa, responding to questions the Senator had asked about mixing zones and blending under the Clean Water Act.

In the June 30, 2011 letter, Nancy Stoner addressed EPA's policy regarding the use of mixing zones for bacteria in waters designated for swimming. Mixing zones are small areas near discharge outfalls in which water quality criteria may be exceeded if the designated uses of the water will still be protected. Mixing zones are generally used when protection of aquatic life is at issue (e.g., fish may swim in and out of a small mixing zone without harm). The Stoner letter explained that EPA's position, as expressed in a 2008 EPA memorandum, is that mixing zones that allow for elevated levels of bacteria in waters designated for human recreation should not be permitted because they could result in significant human health risks. The Iowa League of Cities argued that that the Stoner letter (and EPA memorandum) imposed new regulatory requirements without following the notice and comment procedures required under the APA, essentially prohibiting mixing zones in waters designated for primary contact recreation. The Court agreed with the League and vacated what the Court called EPA's "mixing zone rule." However, the Court noted that EPA's approach to mixing zones is not obviously precluded by the plain meaning of the CWA and, should EPA wish to institute the rule, it may seek to do so using the appropriate procedures.

The September 14, 2011 letter discussed whether diversion of peak flow to certain treatment processes would be subject to the EPA NPDES bypass regulation. The letter stated that generally flows that were diverted around the biological treatment units would constitute a

bypass unless the diverted flow was routed to a unit that was itself a biological treatment unit. The Iowa League of Cities argued that EPA's statements amended the existing bypass regulations and secondary treatment regulations without providing the statutorily required notice and opportunity for comment. The court agreed that EPA's letter statement constituted a new "blending" rule in violation of the APA. The Court also held that EPA's interpretation of the bypass regulation violated the CWA because it effectively imposed secondary treatment requirements on flows before the point of discharge that exceeded EPA's statutory authority.

EPA is reviewing the decision and discussing potential next steps with the Department of Justice.

Possible Questions and Answers

How does EPA plan to respond to the court's decision? It is too early to speculate on what EPA may do because the Agency is still in the process of reviewing the decision and considering its options, in consultation with DOJ.

Does this mean sources can start polluting in water that States have designated for recreational uses like swimming? No, States in establishing water quality standard may allow the use of mixing zones as an element of a standard. States must submit their water quality standards to EPA for review and approval or disapproval. Consequently, EPA will have the opportunity to review any changes to State water quality standards that would allow mixing zones for pollutants in areas that the State has designated for recreational uses. In addition, EPA may review and object to proposed Clean Water Act discharge permits if they included a mixing zone that would fail to protect water quality standards.

OGC Contacts

Richard Witt (202-564-5496) and Lee Schroer (202-564-5476)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2[illegible] 2014

OFFICE OF WATER

Mr. John Hall
Hall & Associates
1101 15th Street, NW, Suite 203
Washington, D.C. 20005-5004

Re: Freedom of Information Act Request EPA-HQ-2014-000552

Dear Mr. Hall:

This is the final response to the above-referenced Freedom of Information Act (FOIA) request submitted to the U.S. Environmental Protection Agency (EPA) on October 25, 2013. On November 21, 2013, the EPA sent you a written request for an assurance of payment, pursuant to 40 C.F.R. § 2.107(e), to which you responded by modifying your request December 2, 2013, to provide only the following records:

1. Any legal or regulatory analysis or briefing materials prepared in support of the agency's decision to only apply the *Iowa League of Cities* decision in the 8th Circuit;

2. Any notifications given to the Regional offices from EPA Headquarters regarding the agency's aforementioned decision to only apply the Iowa League of Cities decision in the 8th Circuit; and

3. Any documents explaining how peak flow processing (also known as "blending") and bacteria mixing zones for CSO and stormwater discharges will be addressed in permitting and enforcement actions within the 8th Circuit versus outside of the 8th Circuit.

After this modification, the EPA updated its cost estimate for responding to your FOIA request and sought another written assurance of payment on December 11, 2013. On December 11, 2013, you further clarified that you limited the request to documents residing at or prepared by EPA Headquarters or used by EPA Headquarters to render its decision. Finally, the EPA sent you its final written request for an assurance of payment for $1,073.25 on December 12, 2013. In addition, the EPA informed you that the Agency needed an extension of time to complete your FOIA request and would complete your FOIA request by January 31, 2014. Your office provided a written confirmation via email on December 16, 2013. Given this history, the EPA has been diligently responding to your FOIA request in good faith and did not miss this FOIA request's agreed deadline.

As promised, the EPA provided an initial production to your FOIA request in a December 24, 2013, letter. The December 24, 2013, letter included an itemized invoice for $1,015.75, which is the cost of responding to the FOIA request. If you have not done so already, please forward your check or money order, made payable to the U.S. Environmental Protection Agency, within 30 days of the date of this response. Your check should refer to the FOIA number above and should be accompanied by the top portion of the enclosed Bill for Collection. Your prompt payment of the amount indicated will be appreciated.

Today's response does not include the release of additional responsive documents. We are unable to provide the documents listed in the attachment which have been determined to be exempt from mandatory disclosure by either the deliberative process or attorney-client privileges of 5 U.S.C. 552(b)(5) as pre-decisional, deliberative, and confidential or the investigatory records compiled for law enforcement purposes privilege of 5 U.S.C. 552(b)(7).

You may appeal this response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal." The appeal may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed (including the assigned FOIA request number - HQ-FOI-02026-10). Your appeal should also refer to the date of this determination and my name, title, and address.

Please contact me at (202) 564-1185 if you have any questions regarding our response.

Sincerely,

Deborah G. Nagle, Director
Water Permits Division

Attachment

Attachment

Documents withheld under FOIA Request EPA-HQ-2014-000552
January 27, 2014

1. Working draft of paper entitled "Iowa League of Cities," April 2, 2013, 1:51 pm. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

2. Working draft of paper entitled "Iowa League of Cities," April 2, 2013, 5:03 pm. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

3. Working draft of paper entitled "Iowa League of Cities," April 2, 2013, 5:49 pm.). This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

4. Working draft of paper entitled "Iowa League of Cities," April 3, 2013, 9:53 am. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

5. Working draft of paper entitled "Iowa League of Cities," April 3, 2013, 2:43 pm. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

6. Working draft of paper entitled "Iowa League of Cities," April 3, 2013, 3:45 pm. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

7. Draft letter from Brenda Mallory, Acting General Counsel to Ignacia Moreno, Assistant Attorney General entitled "Re: EPA request to file a petition for rehearing en banc in Iowa League of Cities v. EPA (8th Cir. No. 11-3412)(March 25, 2013), April 11, 2013, 6:31 pm. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

8. Draft letter from Brenda Mallory, Acting General Counsel to Ignacia Moreno, Assistant Attorney General entitled "Re: EPA request to file a petition for rehearing en banc in Iowa League of Cities v. EPA (8th Cir. No. 11-3412)(March 25, 2013), April 11, 2013, 6:39 pm. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

9. Draft letter from Brenda Mallory, Acting General Counsel to Ignacia Moreno, Assistant Attorney General entitled "Re: EPA request to file a petition for rehearing en banc in Iowa League of Cities v. EPA (8th Cir. No. 11-3412)(March 25, 2013), April 12, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

10. Draft letter from Brenda Mallory, Acting General Counsel to Ignacia Moreno, Assistant Attorney General entitled "Re: EPA request to file a petition for rehearing en banc in Iowa League of Cities v. EPA (8th Cir. No. 11-3412)(March 25, 2013), April 16, 2013, 3:50 pm. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

11. Draft letter from Brenda Mallory, Acting General Counsel to Ignacia Moreno, Assistant Attorney General entitled "Re: EPA request to file a petition for rehearing en banc in Iowa League of Cities v. EPA (8th Cir. No. 11-3412)(March 25, 2013), April 16, 2013, 5:49 pm. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

12. Draft letter from Brenda Mallory, Acting General Counsel to Ignacia Moreno, Assistant Attorney General entitled "Re: EPA request to file a petition for rehearing en banc in Iowa

League of Cities v. EPA (8th Cir. No. 11-3412)(March 25, 2013), April 17, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

13. Working draft of untitled document discussing 2 options regarding seeking *Certiorari*, August 7, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

14. Working draft of document titled "Issue: Should EPA recommend that DOJ petition the Supreme Court for writ of certiorari to overturn the Eighth's Circuit decision in *Iowa League of Cities*?" August 10, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

15. Working draft of document titled "Issue: Should EPA recommend that DOJ petition the Supreme Court for writ of certiorari to overturn the Eighth's Circuit decision in *Iowa League of Cities*?" August 12, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

16. Working draft of untitled paper addressing the issue of non-acquiescence, October 28, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

17. Working draft of paper "Iowa League of Cities: Next Steps" October 28, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

18. Working draft of paper "Iowa League of Cities: Next Steps" October 29, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C

552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

19. Draft comments on draft letter from Bill Hinkel, Maine Department of Environmental Protection RE: Changes to CSO-Related Bypass Permit Conditions, July 17, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

20. Draft letter from Nancy K. Stoner to Senator Chuck Grassley, dated July 16, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

21. Draft letter from Nancy K. Stoner to Senator Chuck Grassley, dated June 25, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

22. Draft Response to the Petition of the Town of Concord, MA, dated October 28, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

23. Email from Brad Ammons to Loren Denton, subject "Iowa League of Cities ruling policy/potential impacts" dated April 11, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

24. Email from Richard Witt to Brenda Mallory, subject "RE: Iowa League letter" dated September 13, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

25. Email from Steven Neugeboren to Brenda Mallory, subject "Meeting this week on Iowa League" dated October 21, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

26. Email from Richard Witt to Wendy Silver, subject "Iowa League of Cities" dated October 24, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice. ****

27. Email from Andrew Doyle to Richard Witt, subject "Iowa League – nonacquiescence issue" dated October 28, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

28. Email from Kevin Weiss to Connie Bosma, subject "SSO Peak Wet Weather Flows/Blending" dated August 1, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

29. Email from Sylvia Horwitz to Richard Witt, subject "RE: Action required Fw: CSO-Related Bypasses" dated July 30, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

30. Email from Joseph Theis to Leslie Humphrey, subject "Iowa League of Cities" dated September 5, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

31. Email from Kevin Weiss to Connie Bosma, subject "OGC Timing Issue" dated August 14, 2013. This document is withheld under the deliberative process and attorney-client

privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

32. Email from Kevin Weiss to Sylvia Horwitz, subject "Rockland draft permit", dated August 27, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

33. Email from Kevin Weiss to David Webster, subject "Letter to CSO Related Bypass APR 2013" dated August 26, 2013. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative.

34. Email from Kevin Weiss to Glenn Curtis, subject "NFA materials" dated October 31, 2013. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative.

35. Email from Kevin Weiss to James Vinch, subject "briefing on Iowa League Decisions" dated September 25, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

36. Email from Kevin Weiss to Connie Bosma, subject "Iowa League v. EPA" dated October 22, 2013. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative.

37. Email from Kevin Weiss to Richard Witt, subject "Region 1 comments on ME CSO-related bypass letter", dated August 16, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

38. Email from Kevin Weiss to Mary Ellen Levine, subject "ME letter", dated October 31, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

39. Email from Nancy Stoner to Travis Loop, subject "IA trip", dated August 9, 2013. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative.

40. Email from Steven Neugeboren to Avi Garbow, subject "John Hall (Center for Regulatory Reasonableness) presentation on 8th circuit decision. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

41. Email from Steven Neugeboren to Mary Ellen Levine, subject "Meeting on Iowa League is Wed Oct 30th at 9" dated October 21, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

42. Email from Sushila Nanda to Christine Alvarez, subject "Wet Weather Conference call scheduled for Wednesday" dated October 2, 2013. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative.

43. Email from Sushila Nanda to Christine Alvarez, subject "Follow up 8/7/13 Wet Weather call re: Iowa League of Cities" dated September 5, 2013. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative.

44. Email from Sushila Nanda to Christine Alvarez, subject "Wet Weather Conference call scheduled for Wednesday" dated August 7, 2013. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative.

45. Email from Mary Ellen Levine to Samir Bukhari, subject "Draft Response to Concord Petition", dated October 28, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

46. Meeting invitation entitled "Regional NPDES Program Managers' Call" dated August 15, 2013. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative.

47. Email from Karen Metchis to Brent Larsen, subject "Final Agenda: Sept 19 NPDES Branch Chief Call" dated September 19, 2014. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative.

48. NPDES Program Managers' Conference Call September 19, 2013 minutes. This document is withheld under the deliberative process privilege of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative.

49. Meeting invitation entitled "Iowa League of Cities" dated October 28, 2013. This document is withheld under the deliberative process and attorney-client privileges of 5 U.S.C 552 (b)(5). The internal document was predecisional and deliberative. In addition, the document is also confidential communication between a client and their attorney relating to a legal matter for which the client has sought professional advice.

Related FOIAs

HALL & ASSOCIATES

Suite 701
1620 I Street, NW
Washington, DC 20006-4033
Telephone: (202) 463-1166 Web: http://www.hall-associates.com Fax: (202) 463-4207

Reply to E-mail:
aenglish@hall-associates.com

March 18, 2015

Via FOIAOnline

Regional Freedom of Information Officer
U.S. EPA, Region 2
290 Broadway, 26th Floor
New York, NY 10007-1866
Facsimile: (212) 637-3668
Email: r2.foia@epa.gov

Re: Freedom of Information Act Request for Records Concerning the October 9, 2014, Letter to the New Jersey Department of Environmental Protection from Kate Anderson, Chief of the Clean Water Regulatory Branch for the United States Environmental Protection Agency, Region II

To Whom This May Concern:

This is a request for a public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. Section 552, as implemented by the Environmental Protection Agency ("EPA") at 40 C.F.R. Part 2. For purposes of this request, the definition of "records" includes, but is not limited to, documents, letters, memoranda, notes, reports, e-mail messages (whether from official or private email accounts), policy statements, data, technical evaluations or analysis, and studies.

Background

By letter dated October 9, 2014 (the "Letter"), Ms. Kate Anderson, Chief of the Clean Water Regulatory Branch for EPA Region 2 ("EPA R2"), informed the New Jersey Department of Environmental Protection ("NJDEP") that blending of CSO flows at municipal wastewater facilities was an unlawful bypass unless a no feasible alternatives analysis was completed and approved. *See* Exhibit 1, Letter. Additionally, based on detailed discussions between EPA and NJDEP, NJDEP confirmed that "EPA has determined that the *Iowa League of Cities* decision is only applicable in the 8th Circuit....for the remainder of the nation outside the 8th Circuit, intentionally diverting flow around treatment processes will be considered a prohibited bypass

unless the conditions of 40 C.F.R. § 122.41(m) are satisfied." *See* Exhibit 2, Excerpts of NJDEP Response to Comments on Permit NJ0021016 – Comments 95-100 and 102-105, at 6.

Request

This request seeks any and all records:

1. Related to the issuance of the October 9, 2014 Letter to NJDEP; and/or
2. Regarding communications to, from, or within EPA R2 concerning whether or not:
   a. EPA still classifies blending as a bypass; and/or
   b. Has decided that the decision in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), does not apply outside of the 8th Circuit, as reported by NJDEP.

***

Please contact the undersigned if the associated search and duplication costs are anticipated to exceed $250.00. Please duplicate the records that are responsive to this request and send it to the undersigned at the above address. If the requested record is withheld based upon any asserted privilege, please identify the basis for the non-disclosure.

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that only the necessary document is duplicated.

Respectfully,

Alexander J. E. English
Hall & Associates
1620 I St., NW
Washington, DC 20006-4033
(202) 463-1166
aenglish@hall-associates.com

Attachments

HALL & ASSOCIATES

Suite 701
1620 I Street, NW
Washington, DC 20006-4033
Telephone: (202) 463-1166 Web: http://www.hall-associates.com Fax: (202) 463-4207

Reply to E-mail:
acarlesco@hall-associates.com

January 7, 2016

Via FOIA Online

U.S. EPA Region 10
(AWT-128)
1200 Sixth Ave.
Seattle, WA 98101

RE: Freedom of Information Act Request for Records Associated with November 5, 2013 Memorandum from EPA Headquarters Entitled "Applicability of Iowa League decision to EPA permitting determinations" among Regional Offices

To Whom This May Concern:

This is a request for a public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. Section 552, as implemented by the Environmental Protection Agency ("EPA") at 40 C.F.R. Part 2. For purposes of this request, the definition of "records" includes, but is not limited to, documents, letters, memoranda, notes, reports, e-mail messages from both work and personal accounts, policy statements, data, technical evaluations or analysis, and studies.

Background

On November 5, 2013, a memorandum entitled "Applicability of Iowa League decision to EPA permitting determinations," was drafted and distributed by EPA Headquarters to all of the Regional Water Permit Division Directors. *See* Ex. 1 – Vaughn Index Reference; Ex. 2 – Redacted Memos. This memorandum outlined EPA's position on the national applicability of the Eighth Circuit Court's decision in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) to future permitting actions outside of the 8th Circuit.

Request

Specifically, this Request seeks the following:

- All records transmitting, referencing, or discussing the content and applicability of the November 5, 2013 memorandum. Such records would include all correspondence to and from state permitting agencies, permittees, other EPA regions, or EPA Headquarters.

* * *

Please contact the undersigned if the associated search and duplication costs are anticipated to exceed $250.00. Please duplicate the records that are responsive to this request and send it to the undersigned at the above address. If the requested record is withheld based upon any asserted privilege, please identify the basis for the non-disclosure.

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that only the necessary document is duplicated.

Respectfully,

/s/ *Adam Carlesco*

Adam Carlesco
Hall & Associates
1620 I St., NW
Washington, DC 20006-4033
(202) 463-1166
acarlesco@hall-associates.com

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 30 2016

OFFICE OF WATER

Mr. Adam Carlesco
Hall & Associates
Suite
1620 I Street, NW
Washington, D.C. 20006-4033

Re: Freedom of Information Act Requests EPA-HQ-2016-002599, EPA-R1-2016-002587, EPA-R2-2016-002589, EPA-R3-2016-002585, EPA-R4-2016-002590, EPA-R5-2016-002592, EPA-R6-2016-002593, EPA-R7-2016-002595, EPA-R8-2016-002597, EPA-9-2016-00298

Dear Mr. Carlesco:

This letter is in reference to your January 7, 2016 Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA), in which you requested all records transmitting, referencing, or discussing the content and applicability of a November 5, 2013 document entitled "Applicability of Iowa League decision to EPA permitting determinations." Such records would include all correspondence to and from state permitting agencies, permittees, other EPA regions, or EPA Headquarters.

On March 16, 2016, you clarified that your January 7, 2016, FOIA request was not intended to include EPA records that solely reference the November 5, 2013 in the context of EPA's December 24, 2013 response to FOIA request EPA-HQ-FOIA-2014-000552, EPA's January 22, 2015 response to FOIA request EPA-HQ-FOIA-2015-001494, Hall and Associates' appeal to FOIA request EPA-HQ-FOIA-2014-000552, and subsequent litigation (Hall & Associates v. U.S. EPA, C.A. Action No. 15-1055 (KBJ).

In response I am enclosing the following documents which are responsive to your request:

1. November 5, 2013 email from Mary Ellen Levine to Richard Witt. Subject: Draft Iowa League Memo. Portions of this document are withheld under the deliberative process and attorney-client privileges of 5 U.S.C. § 552(b)(5). The internal document was predecisional and deliberative. In addition, the document included confidential communication between a client and its attorney relating to a legal matter for which the client has sought professional advice.

2. November 6, 2013 email from Mary Ellen Levine to Richard Witt, Steven Neugeboren. Subject: Iowa.

3. November 6, 2013 Calendar Appointment. Subject: Iowa League memorandum. Invitees Richard Witt, Mary Ellen Levine, Steven Neugeboren. Portions of this document are withheld under the deliberative process and attorney-client privileges of 5 U.S.C. § 552(b)(5). The internal document was predecisional and deliberative. In addition, the document included confidential communication between a client and its attorney relating to a legal matter for which the client has sought professional advice.

4. November 7, 2013 email from Richard Witt to Stephen Neugeboren. Subject: I did some more fiddling with the Iowa memo.

5. November 15, 2013 email from Stephen Neugeboren to Brenda Mallory, Avi Garbow, Mary Ellen Levine, Richard Witt. Subject: IA League of Cities –deliberative process, atty client. Portions of this document are withheld under the deliberative process and attorney-client privileges of 5 U.S.C. § 552(b)(5). The internal document was predecisional and deliberative. In addition, the document included confidential communication between a client and its attorney relating to a legal matter for which the client has sought professional advice.

6. November 19, 2013 email from Kevin Weiss to James Vinch. Subject: Copy of the draft memo.

7. November 19, 2013 email from James Vinch to Joe Theis. Subject: Copy of the draft memo. Portions of this document are withheld under the deliberative process and attorney-client privileges of 5 U.S.C. § 552(b)(5). The internal document was predecisional and deliberative. In addition, the document included confidential communication between a client and its attorney relating to a legal matter for which the client has sought professional advice.

8. November 19, 2013 email from James Vinch to Joseph Theis, Andy Crossland, Loren Denton. Subject: ILOC. Portions of this document are withheld under the deliberative process and attorney-client privileges of 5 U.S.C. § 552(b)(5). The internal document was predecisional and deliberative. In addition, the document included confidential communication between a client and its attorney relating to a legal matter for which the client has sought professional advice.

9. Document "Applicability of Iowa League decision to EPA permitting determinations." November 5, 2013. Portions of this document are withheld under the deliberative process and attorney-client privileges of 5 U.S.C. § 552(b)(5). The internal document was predecisional and deliberative. In addition, the document included confidential communication between a client and its attorney relating to a legal matter for which the client has sought professional advice.

10. Document "Applicability of Iowa League decision to EPA permitting determinations." November 5, 2013 – second version of the day. Portions of this document are withheld under the deliberative process and attorney-client privileges of 5 U.S.C. § 552(b)(5). The internal document was predecisional and deliberative. In addition, the document included confidential communication between a client and its attorney relating to a legal matter for which the client has sought professional advice.

11. Document "Applicability of Iowa League decision to EPA permitting determinations." November 6, 2013. Portions of this document are withheld under the deliberative process and attorney-client privileges of 5 U.S.C. § 552(b)(5). The internal document was predecisional and deliberative. In addition, the document included confidential communication between a client and its attorney relating to a legal matter for which the client has sought professional advice.

12. Document "Applicability of Iowa League decision to EPA permitting determinations." November 7, 2013. Portions of this document are withheld under the deliberative process and attorney-client privileges of 5 U.S.C. § 552(b)(5). The internal document was predecisional and deliberative. In addition, the document included confidential communication between a client and its attorney relating to a legal matter for which the client has sought professional advice.

13. Document "Applicability of Iowa League decision to EPA permitting determinations." November 18, 2013. Portions of this document are withheld under the deliberative process and attorney-client privileges of 5 U.S.C. § 552(b)(5). The internal document was predecisional and deliberative. In addition, the document included confidential communication between a client and its attorney relating to a legal matter for which the client has sought professional advice.

The cost of providing the information enclosed in this letter is $561.50. An itemized invoice covering the charges for processing your request is enclosed. Please forward your check or money order, made payable to the U.S. Environmental Protection Agency, within 30 days of the date of this response. Your check should refer to the FOIA number above and should be accompanied by the top portion of the enclosed Bill for Collection. Your prompt payment of the amount indicated will be appreciated.

You may appeal this response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOIA number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

The appeal may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed (including the assigned FOIA request number - EPA-HQ-2016-002599. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal." Your appeal should also refer to the date of this determination and my name, title, and address. Please contact Kevin Weiss at (202) 564-0742 if you have any questions regarding our response.

Sincerely,

Deborah G. Nagle, Director
Office of Wastewater Management

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 11 2016

OFFICE OF WATER

Mr. Adam Carlesco
Hall & Associates
Suite
1620 I Street, NW
Washington, D.C. 20006-4033

Re: Freedom of Information Act Requests EPA-HQ-2016-002599, EPA-R1-2016-002587, EPA-R2-2016-002589, EPA-R3-2016-002585, EPA-R4-2016-002590, EPA-R5-2016-002592, EPA-R6-2016-002593, EPA-R7-2016-002595, EPA-R8-2016-002597, EPA-9-2016-00298

Dear Mr. Carlesco:

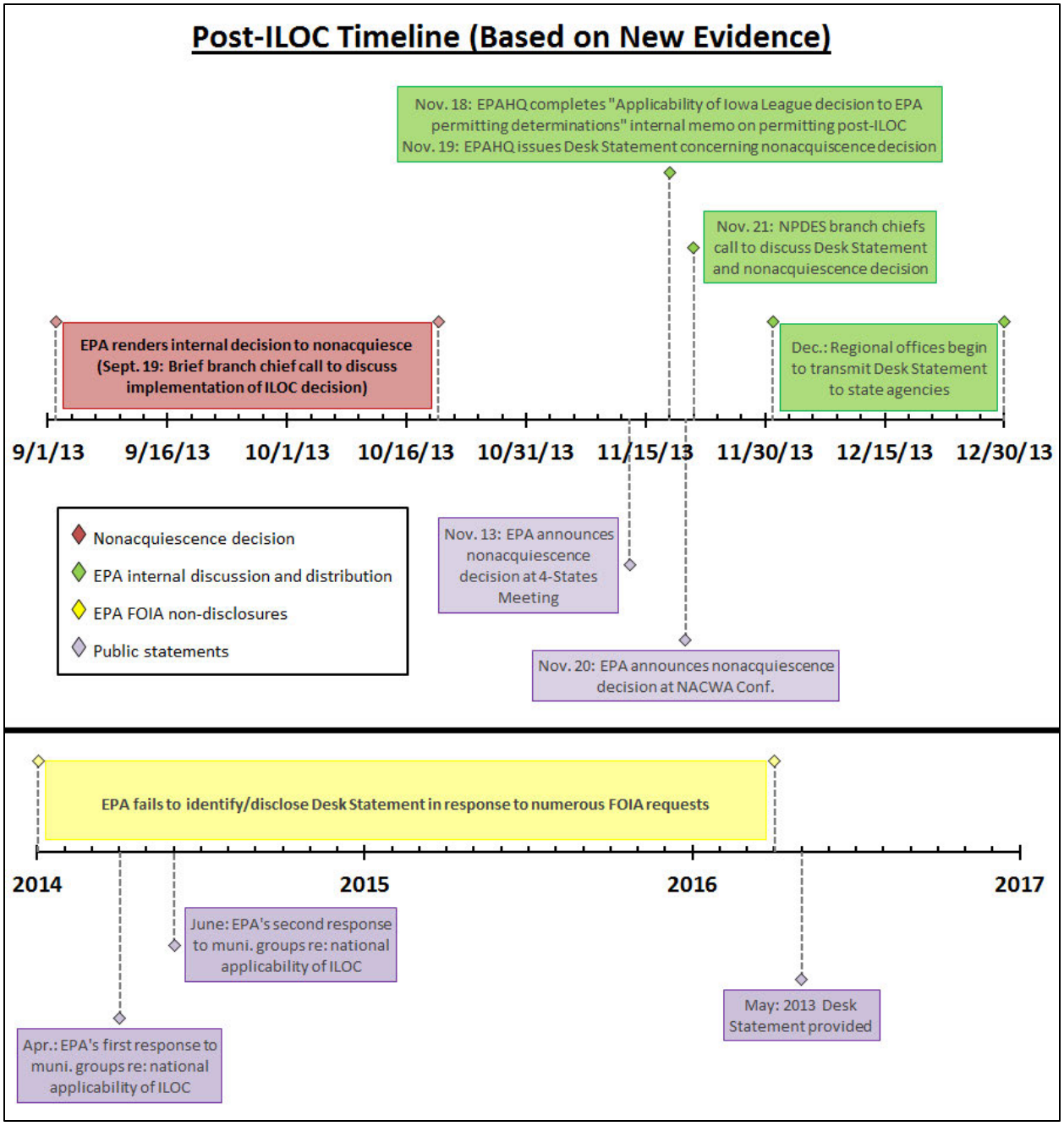
Thank you for your April 1, 2016 email to Kevin Weiss, in which you asked "where are the regional office records" concerning your January 7, 2016 FOIA requests. The Agency provided its response to your January 7, 2016 FOIA requests on March 30, 2016. The January 7, 2016 FOIA requests asked for all records transmitting, referencing, or discussing the content and applicability of a November 5, 2013 document entitled "Applicability of Iowa League decision to EPA permitting determinations." In your April 1, 2016 email, you explained that the January 7, 2016 FOIA requests sought information received from all the EPA regional offices concerning their knowledge of the November 5, 2013 drafts.

As you are aware, the November 5, 2013 memorandum was a working draft that was never finalized and was not disseminated to state permitting agencies, permittees, or other EPA regions. After completing a comprehensive search that was reasonably calculated to uncover all relevant documents, EPA found no regional records associated with the November 5, 2013 document.

Please contact Kevin Weiss at (202) 564-0742 if you have any questions regarding this matter.

Sincerely,

Deborah G. Nagle, Director
Office of Wastewater Management


Post-ILOC Timeline (Based on New Evidence)
Nov. 18: EPAHQ completes "Applicability of Iowa League decision to EPA permitting determinations" internal memo on permitting post-ILOC
Nov. 19: EPAHQ issues Desk Statement concerning nonacquiscence decision
Nov. 21: NPDES branch chiefs call to discuss Desk Statement and nonacquiescence decision
EPA renders internal decision to nonacquiesce (Sept. 19: Brief branch chief call to discuss implementation of ILOC decision)
Dec.: Regional offices begin to transmit Desk Statement to state agencies
9/1/13
9/16/13
10/1/13
10/16/13
10/31/13
11/15/13
11/30/13
12/15/13
12/30/13
Nonacquiescence decision
EPA internal discussion and distribution
EPA FOIA non-disclosures
Public statements
Nov. 13: EPA announces nonacquiescence decision at 4-States Meeting
Nov. 20: EPA announces nonacquiescence decision at NACWA Conf.
EPA fails to identify/disclose Desk Statement in response to numerous FOIA requests
2014
2015
2016
2017
June: EPA's second response to muni. groups re: national applicability of ILOC
May: 2013 Desk Statement provided
Apr.: EPA's first response to muni. groups re: national applicability of ILOC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, *et al.*, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	Case No. 3:15-cv-00059-RRE-ARS

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISSOLVE PRELIMINARY INJUNCTION AND DISMISS AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Legislative Materials

Other Sources

INTRODUCTION

Plaintiffs—the States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming, and the New Mexico Environment Department and the New Mexico State Engineer ("the States")—have filed actions seeking review of the Clean Water Rule ("Rule") both in this Court and in the United States Court of Appeals for the Sixth Circuit. On August 27, 2015, this Court concluded that it had jurisdiction to review the Rule, and granted a motion for preliminary injunction, staying the implementation of the Rule. Doc. 70. The States, along with some of the other parties seeking review of the Rule in the Sixth Circuit, moved to dismiss their petitions for review before that court. On February 22, 2016, the Sixth Circuit concluded that jurisdiction to review the Rule lies exclusively in that court pursuant to Section 509(b)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1369(b). The Sixth Circuit therefore denied the motions to dismiss brought by the States and other petitioners.

In light of the decision of the Sixth Circuit that it has jurisdiction and will proceed to review the Clean Water Rule, the Federal Defendants ("the Agencies") move to dissolve the preliminary injunction and to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure 12(h) and 60(b)(6).

First, the Sixth Circuit has concluded that it has exclusive jurisdiction to review the Rule under the Clean Water Act's judicial-review provision, Section 509(b), 33 U.S.C. § 1369(b), making clear that jurisdiction resides exclusively in the Sixth Circuit. Because the Sixth Circuit is the court in which all of the petitions for review of the Rule have been consolidated under 28 U.S.C. § 2112(a), that court's decision that it has exclusive jurisdiction must be given controlling weight. Second, the availability of review under CWA Section 509(b)(1) deprives this Court of

authority to grant relief under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706. Third, review of the Clean Water Rule in multiple courts would be contrary to prudential limits on duplicative litigation. Fourth, the Sixth Circuit and other district courts have reached the correct conclusion regarding review of the Rule under Section 509. Finally, the Sixth Circuit's jurisdictional ruling is also conclusive as to the States' NEPA claim because that claim is inextricably intertwined with their challenge to the Clean Water Rule and will be resolved by the Sixth Circuit.

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. The Clean Water Act and the Clean Water Rule

The CWA prohibits the discharge of any "pollutant" into "navigable waters" except as specifically allowed. 33 U.S.C. §§ 1311(a), 1362(7), (12). The Act broadly defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id*. § 1362(7). Congress used this broad definition because applying the federal protections of the CWA to the relatively few waterways that support navigation would make it impossible to achieve the objectives of the Act. S. Rep. No. 92-414, at 77 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43. The scope of "waters of the United States" is a critical component of the Act, defining, for example, where regulated parties must obtain permits to discharge pollutants. 33 U.S.C. §§ 1311, 1341, 1342, 1344.

The Clean Water Rule amends the definition of "waters of the United States" to provide clarity and certainty to the regulated community about what waters are within federal CWA jurisdiction and what waters fall outside of CWA protection. 80 Fed. Reg. 37,054 (June 29, 2015). The Agencies developed the Rule after a comprehensive analysis of the relevant science

and exhaustive public participation, including more than 400 meetings with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, federal agencies, and others. 80 Fed. Reg. at 37,057. The Agencies were further guided by their decades of experience in implementing the CWA and the information provided in over a million comments on the proposed regulation. *Id*. As the Sixth Circuit has observed, the Agencies "conscientiously endeavored, within their technical expertise and experience, and based on reliable peer-reviewed science, to promulgate new standards to protect water quality that conform to the Supreme Court's guidance." *In re Clean Water Rule: Definition of "Waters of the United States,"* No. 15-3751 (6th Cir.), Doc. 49-2, Order of Stay at 6.

B. Judicial review under the Clean Water Act

To establish a clear and orderly process for judicial review, the CWA vests the federal courts of appeals with exclusive, original jurisdiction to review certain EPA actions. As relevant here, actions originally reviewable in the courts of appeals include the Administrator's action

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
>
> (F) in issuing or denying any permit under section 1342 of this title[.]

CWA Section 509(b)(1)(E), (F), 33 U.S.C. § 1369(b)(1)(E), (F). Where review under Section 509(b)(1) is available, "it is the exclusive means of challenging actions covered by the statute." *Decker v. NEDC*, 133 S. Ct. 1326, 1334 (2013). Petitions for review generally must be filed within 120 days after the challenged EPA action. 33 U.S.C. § 1369(b)(1).

EPA actions "with respect to which review could have been obtained under [Section 509(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2); *Decker*, 133 S. Ct. at 1334. Section 509(b) thereby

promotes, *inter alia*, the ability of regulators, the regulated community, and the public to rely on the validity of EPA regulations that are not promptly challenged or are upheld by a court of appeals.

When multiple petitions for review are filed to challenge a single EPA action, those petitions are by statute consolidated in one court of appeals. 28 U.S.C. § 2112(a)(3); *see, e.g.*, *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012); *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009). Specifically, Section 2112(a) provides that the Judicial Panel on Multidistrict Litigation "*shall*, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and *shall* issue an order consolidating the petitions for review in that court of appeals." 28 U.S.C. § 2112(a)(3) (emphasis added).

Final agency action under the CWA that falls outside the categories enumerated in Section 509(b)(1), but that is reviewable under general principles of administrative law, may generally be challenged in federal district court under the Administrative Procedure Act. 5 U.S.C. § 701 et seq. An APA suit must be brought within six years from the date of the challenged agency action. 28 U.S.C. § 2401(a). Consequently, the validity of actions reviewable in district courts under the APA rather than in the courts of appeals under CWA Section 509(b)(1) can remain uncertain for vastly longer periods of time.

C. The National Environmental Policy Act

The Clean Water Act specifically exempts actions by EPA's Administrator from the requirements of the National Environmental Policy Act ("NEPA"), providing (with certain exceptions not relevant here) that "no action of the Administrator taken pursuant to this chapter

shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA].” 33 U.S.C. § 1371(c)(1) (CWA Section 511(c)(1)).

Where NEPA applies, “NEPA’s purpose is to ensure a fully informed and well considered decision … and disclosure to the public that the agency has considered environmental concerns in its decisionmaking.” *Friends of Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 973-74 (8th Cir. 2011). NEPA does not contain its own cause of action and NEPA challenges are thus reviewed under the APA.

II. The Clean Water Rule litigation

A. Petitions for review in the courts of appeals

More than 100 parties filed 22 petitions for review of the Clean Water Rule in multiple circuit courts of appeals within the 120-day window for filing petitions under CWA Section 509(b).[1] As required by 28 U.S.C. § 2112(a)(3), the Judicial Panel for Multidistrict Litigation consolidated the petitions in the United States Court of Appeals for the Sixth Circuit, which was randomly selected by the Panel. *In re Final Rule: Clean Water Rule: Definition of “Waters of the United States,”* MCP No. 135 (J.P.M.L.), Doc. 3.

On September 9, 2015, a group of State petitioners filed a motion in the Sixth Circuit for a nationwide stay of the Rule pending judicial review. On October 9, 2015, that court granted the motion and issued an order staying the Rule pending further order of the court. *In re EPA and Dep’t of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). Those same States also moved to dismiss their own petitions, claiming a lack of subject-matter jurisdiction. To facilitate the orderly resolution of the jurisdictional question, the Sixth Circuit established a briefing schedule to allow

[1] Petitions were filed in eight U.S. Courts of Appeals—the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

all parties to file motions and responses. Plaintiffs here (petitioners in the Sixth Circuit) filed their own motion to dismiss in the Sixth Circuit. *North Dakota v. EPA*, No. 15-3831 (6th Cir.) Doc. 55. The court heard oral argument on the motions on December 8, 2015, and on February 22, 2016, the Sixth Circuit issued a decision denying all motions to dismiss, thus confirming that court's exclusive jurisdiction to hear challenges to the Clean Water Rule. *In re Dep't of Def. and EPA Final Rule*, No. 3751 (lead) (6th Cir.) Doc. 72-2. (Attachment 1).

In the lead opinion, Judge McKeague concluded that the Rule is an EPA action fitting within both subsections (E) ("other limitation") and (F) ("issuing or denying any permit") of Section 509(b)(1) of the Clean Water Act. *Id. at* 11, 16. Judge Griffin disagreed but nevertheless concurred in the judgment based upon the Sixth Circuit's decision in *National Cotton Council of America v. EPA*, which Judge Griffin found to be controlling with respect to subsection (F). *Id.* at 30. Judge Keith dissented, agreeing with Judge Griffin's substantive analysis but disagreeing that *National Cotton Council* is controlling. *Id.* at 33. On February 29, 2016, a petition for rehearing *en banc* was filed by several industry organizations. *In re EPA and Dep't of Def. Final Rule*, No. 3751 (lead) (6th Cir.) Doc. 73.

B. Proceedings in this Court

The States brought the instant action for review of the Clean Water Rule under the Administrative Procedure Act on June 29, 2015, and filed an amended complaint on August 14, 2015. Doc. 1 ¶ 1, Doc. 44. The States allege that the Rule violates the APA, the CWA, NEPA, and the Constitution (Doc. 1 ¶ 2) and assert jurisdiction under the APA, 5 U.S.C. § 706, the federal question statute, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. On August 27, 2015, the Court issued a decision finding it had jurisdiction over this

action and entering a preliminary injunction (Doc. 70) and, on September 4, 2015, the Court clarified that its injunction applied only in the thirteen Plaintiff States (Doc. 79).

Following the Court's decision granting a preliminary injunction and the Sixth Circuit's decision granting a nationwide stay of the Rule, the Agencies asked this Court to stay proceedings pending a ruling by the Sixth Circuit on the jurisdictional question. Doc. 90. The States opposed that motion and also moved the Court to set a schedule for further proceedings. Docs. 82, 93. On November 10, 2015, Magistrate Judge Senechal issued an order denying the Agencies' motion to stay and granting the States' scheduling motion. Doc. 98.

The Agencies filed the certified index to the administrative record on November 20, 2015. Doc. 101. On December 11, 2016, the Court granted the State of Iowa's motion to intervene as a plaintiff. Doc. 107. Currently pending before the Court are the Agencies' appeal of the Magistrate Judge's order denying the Agencies' motion to stay (Doc. 102), Sierra Club's motion to intervene as a defendant (Doc. 127), and the States' motion to complete the administrative record (Doc. 104). Summary judgment briefing has been stayed at the States' request. Doc. 123.

C. Other district court challenges

Like the States, nearly all of the other petitioners in the Sixth Circuit also filed challenges to the Rule in district courts. At this time, fourteen complaints are pending in eleven district courts. The Agencies moved for centralization of pretrial proceedings in the district court actions under 28 U.S.C. § 1407, but the Judicial Panel for Multidistrict Litigation denied the motion. *In re Final Rule: Clean Water Rule: Definition of "Waters of the United States,"* MDL No. 2663 (J.P.M.L.), Doc. 163 (Oct. 13, 2015).

Following notice of the Sixth Circuit's order confirming its jurisdiction to hear the consolidated petitions for review, the Northern District of Oklahoma court dismissed two APA challenges *sua sponte*, concluding that because jurisdiction under 33 U.S.C. § 1369(b)(1) is exclusive, a finding of jurisdiction by the Sixth Circuit "divests this Court of jurisdiction to hear a challenge to a final agency action." *Oklahoma v. EPA*, No. 4:15-cv-381-CVE-FHM (N.D. Okla. Feb. 24, 2016), Doc. 36; *Chamber of Commerce of the United States v. EPA*, No. 4:15-cv-386-CVE-PJC (N.D. Okla. Feb. 24, 2016) Doc. 49 (Attachment 2) (citing *Maier v. EPA*, 114 F.3d 1032, 1036-37 (10th Cir. 1997)).

Prior to the Sixth Circuit's decision, two district courts issued decisions that are also contrary to this Court's conclusion that subject-matter jurisdiction lies in district court. The Northern District of West Virginia and Southern District of Georgia courts held that jurisdiction lies exclusively in the Sixth Circuit under 33 U.S.C. § 1369(b)(1). *Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506 (N.D. W.Va., Aug. 26, 2015)[2] (Attachment 3); *Georgia v. McCarthy*, No. 2:15-cv-79, 2015 WL 5092568 (S.D. Ga., Aug. 27, 2015) (appeal pending) (Attachment 4).

No other district court where a challenge to the Clean Water Rule has been brought has found that it has subject-matter jurisdiction. Rather, stay motions were either granted or were pending while the jurisdictional issue was under consideration by the Sixth Circuit.

STANDARD OF REVIEW

Any party may challenge subject-matter jurisdiction at any time, pursuant to Rule 12(h)(3). *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003). Courts apply

[2] Murray Energy did not seek appeal in the Fourth Circuit Court of Appeals and has stated that it is "prepared to proceed in [the Sixth Circuit] now that it has ruled on jurisdiction." *Inside EPA Wkly*, Rep. 8 Vol. 37, 2016 WLNR 5849545 (Feb. 26, 2016).

the Rule 12(b)(1) standard to a motion filed under Rule 12(h). *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 879 n. 3 (3d Cir. 1992); *Gates v. Black Hills Health Care Sys.*, 997 F. Supp. 2d 1024, 1029 (D.S.D. 2014). Under Rule 12(b)(1), the court must examine "whether it has authority to decide the claims." *Damon v. Groteboer*, 937 F. Supp. 2d 1048, 1063 (D. Minn. 2013); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (stating that it is "to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (citations omitted). Subject-matter jurisdiction "is something the courts have a duty to examine at all stages of the litigation, *see Crawford v. F. Hoffman–La Roche, Ltd.*, 267 F.3d 760, 764 n. 2 (8th Cir. 2001), and the law of the case doctrine does not foreclose reconsideration of subject matter jurisdiction." *Hall v. USAble Life*, 774 F. Supp. 2d 953, 955 (E.D. Ark. 2011) (citing *Baca v. King*, 92 F.3d 1031, 1035 (10th Cir. 1996)); *DiLaura v. Power Auth. of N.Y.*, 982 F.2d 73, 77 (2d Cir. 1992)).

A motion seeking reconsideration and relief from a non-final order may be brought within a reasonable time under Federal Rule of Civil Procedure 60(b)(6) for "any . . . reason that justifies relief." Fed. R. Civ. P. 60(b)(6), (c); *see Middleton v. McDonald*, 388 F.3d 614, 616 (8th Cir. 2004) (noting broad discretion under Rule 60(b)). The Agencies are mindful that motions for reconsideration serve "to correct manifest errors of law or fact," and do not present "the occasion to tender new legal theories for the first time." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (citation omitted). Rather, Rule 60(b) "provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances." *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986) (citations omitted).

ARGUMENT

I. The Sixth Circuit's decision that it has exclusive subject-matter jurisdiction means that this Court lacks subject-matter jurisdiction.

A. The Sixth Circuit's decision on subject-matter jurisdiction is controlling because that is the choice that Congress made by requiring consolidation of multi-circuit petitions under 28 U.S.C. § 2112(a).

The Sixth Circuit's decision that it has jurisdiction to review the Clean Water Rule is binding on this Court because the Sixth Circuit is the court designated by statute to hear the consolidated petitions for review of the Rule, including the petition filed by the States in the Eighth Circuit and transferred to the Sixth Circuit by order of the Judicial Panel for Multidistrict Litigation. When multiple petitions for review of the same EPA action are filed in different courts of appeals under CWA Section 509(b)(1), the petitions are subject to mandatory consolidation in a single circuit court of appeals randomly selected under 28 U.S.C. § 2112(a). By operation of Section 2112(a), one court is authorized to decide all petitions for review of the same agency action. The agency must file the administrative record in that court, *id.* § 2112(a)(3), and all other courts of appeals "shall" transfer petitions for review of the agency action to the designated circuit, *id.* § 2112(a)(5). This mandatory transfer provision ensures that all challenges to the same agency action are reviewed by the court designated by the Judicial Panel for Multidistrict Litigation's random selection.

A number of statutes provide for judicial review of certain agency actions in only one circuit. *E.g.*, 42 U.S.C. § 7607(b)(1) (actions under the Clean Air Act); 47 U.S.C. § 402(j) (actions under the Federal Communications Act); 15 U.S.C. § 21 (certain orders under anti-trust law). The multi-circuit consolidation process in 28 U.S.C. § 2112 similarly reflects Congress's intent that petitions for review of the same agency action filed in multiple circuits be reviewed in a consolidated proceeding in one court.

To be sure, a decision of a single United States court of appeals normally is binding only within that circuit. *See, e.g., Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (*en banc*). This serves the development of the law by allowing legal issues to "percolate" through the judicial system. However, Congress alters that traditional approach when it enacts a judicial-review provision that specifies a single court to decide multiple challenges to the same agency action. In providing in Section 2112 for consolidation of multiple petitions for review of the same agency action in a single circuit, Congress determined that the interests in judicial economy, prompt resolution, and national uniformity override the interest in fostering multi-circuit development of the law. It follows that Congress intended that the judgment reached by the reviewing court as to that particular agency action be treated as binding nationwide. Indeed, little purpose would be served by consolidation if the judgment reached by the designated circuit were not nationally applicable as to the action under review.

The legislative history of CWA Section 509(b)(1) and 28 U.S.C. § 2112(a) further demonstrates that Congress intended that actions reviewable under Section 509(b)(1) be subject to judicial review in a single, consolidated proceeding. Under the CWA as amended in 1987, Section 509(b)(3) mandated a multi-circuit consolidation process functionally similar to that provided in the current version of Section 2112(a). Pub. L. No. 100-4, § 505(b) (1987), 101 Stat. 7. When Congress amended Section 2112(a) in 1988 to alter the consolidation mechanism from one based on the "first-to-file" to the current random-selection process, it rescinded CWA Section 509(b)(3)'s by then duplicative mechanism for consolidation. Pub. L. No. 100-236, §§ 1-2 (1988).

The cases applying Section 2112 similarly reflect the fundamental presumption that the court selected to review all challenges to the same agency action is authorized to make

nationally-binding determinations on the merits of the case. *See, e.g., North Carolina, Envtl. Policy Inst. v. EPA*, 881 F.2d 1250 (4th Cir. 1989); *City of Gallup v. Fed. Energy Reg. Comm'n*, 702 F.2d 1116 (D.C. Cir. 1983); *Virginia Elec. & Power Co. v. EPA*, 655 F.2d 534 (4th Cir. 1981)[3]; *Natural Res. Defense Council v. EPA*, 673 F.2d 392 (D.C. Cir. 1980).

As noted, the States here filed a petition for review of the Clean Water Rule in the Eighth Circuit Court of Appeals. Under Section 2112(a)(5), that court was required to transfer that petition to the Sixth Circuit. There can be no question but that the Sixth Circuit's judgment on that petition, including its jurisdictional finding, is dispositive and binding on the Eighth Circuit. Thus, the Eighth Circuit would have to reverse any contrary decision by this Court. *Cf. In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (concluding that a decision by a 28 U.S.C. § 1407 transferee court should be treated as binding on return to the transferor court because, if it were not, "transfers under 28 U.S.C. § 1407 could be counterproductive"). The Agencies are bound nationwide by the Sixth Circuit's decisions, win or lose, absent reversal by the Supreme Court. The same is true with respect to all other parties to the Sixth Circuit proceeding, including the plaintiff States here. Any other result would render CWA Section 509(b)(1) and 28 U.S.C. § 2112(a) a nullity.

---

[3] In deciding to transfer a petition for review to the D.C. Circuit, the Fourth Circuit noted that some parties "had raised a possible deficiency in jurisdiction of courts of appeal generally under section 509(b)." *Virginia Electric*, 655 F.2d at 537. The Fourth Circuit left that issue for the D.C. Circuit, as the transferee court that would hear the consolidated petitions, to decide. The D.C. Circuit resolved the jurisdictional issue in *Natural Res. Defense Council v. EPA*, 822 F.2d 104, 109 n.1 (D.C. Cir. 1987). As this and other cases demonstrate, it is uncontroversial for a circuit court in which multiple petitions for review under CWA Section 509(b) are consolidated to resolve questions of jurisdiction under Section 509(b). *See, e.g., Friends of the Everglades*, 699 F.3d at 1283; *Natural Res. Def. Council v. EPA*, 656 F.2d 768, 776 (D.C. Cir. 1981).

Indeed, if parties unhappy with a circuit court randomly selected under Section 2112(a) or wanting to hedge their bets against an adverse decision could simply file duplicative district court challenges, chaos would inevitably ensue. Congress clearly intended to avoid such inefficient, duplicative litigation and forum shopping by means of Section 2112(a). Worse yet, anyone dissatisfied with the designated circuit court's decision on the merits could file a district court action outside of that circuit anytime within six years of the agency action being challenged in the hope of obtaining a different result. *See* 28 U.S.C. § 2401. That would be directly contrary to Congress's intent in enacting Section 2112(a), the judiciary's interest in preserving scarce resources, agencies' interest in efficient administration of Congress's statutory mandates, and the public's interest in regulatory certainty.

Congress clearly expressed its objective of uniformity by centralizing multi-circuit petitions for review of agency action in a single circuit. Consistent with that intent, this Court must abide by the Sixth Circuit's determination that it has exclusive subject-matter jurisdiction to review challenges to the Clean Water Rule. *Cf. Oklahoma*, No. 4:15-cv-381-CVE-FHM (N.D. Okla. Feb. 24, 2016), Doc. 36 at 3 (Attachment 2) (dismissing district court cases upon notice of Sixth Circuit's order confirming its exclusive jurisdiction).

B. Exclusive Review under CWA Section 509(b)(1) precludes review in the district courts under the Administrative Procedure Act.

The States' claims in this case challenge the Clean Water Rule—an agency action that the Sixth Circuit held falls within CWA Section 509(b)(1)'s exclusive judicial review provision. *In re EPA and Dep't of Def. Rule*, Doc. 72-2 (Attachment 1). Because the Sixth Circuit has confirmed its jurisdiction to review the Rule, the States have an adequate remedy in a court and cannot pursue a duplicative challenge in this Court under the APA.

"[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *TRAC v. FCC*, 750 F. 2d 70, 77 (D.C. Cir. 1984) (citations omitted).[4] The law of the Eighth Circuit is in accord—"[w]hen Congress has established a special statutory review procedure for administrative actions, we generally treat that procedure as the exclusive means of review." *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989) (Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") judicial review scheme provided exclusive mechanism for review of FIFRA registrations and cancellations); *see also Sw. Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906 (8th Cir. 1984) *cert. granted, judgment vacated sub nom. Arkansas Pub. Serv. Comm'n v. Sw. Bell Tel. Co.*, 476 U.S. 1167 (1986) (a specific grant of exclusive jurisdiction takes precedence over a more general grant). With regard to the CWA, the Supreme Court has expressly stated that where Section 509(b)(1) applies, "it is the exclusive means of challenging actions covered by the statute." *Decker*, 133 S. Ct. at 1334; *see also Maier*, 114 F.3d at 1036-37 (recognizing same).

Although the States assert jurisdiction in this Court under the Administrative Procedure Act, 5 U.S.C. § 706, the federal question statute, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (Doc. 1 ¶ 3), none of those statutes provides a separate basis for jurisdiction here.[5] By its terms, the APA limits judicial review to final agency actions

---

[4] *See also Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) (where Congress has enacted a specific statutory scheme of review, that mode must be adhered to notwithstanding an express command of exclusiveness).

[5] The APA itself is not a grant of jurisdiction, but provides a cause of action and a limited waiver of sovereign immunity, while the federal question statute establishes subjects that are within the jurisdiction of federal courts to entertain ("civil actions arising under the Constitution, laws, or treaties of the United States") but does not waive sovereign immunity. For simplicity, we refer to the States' claim under the APA and the federal question statute as "APA claims." The Declaratory Judgment Act creates a remedy, but does not provide a basis for jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *First Fed. Sav. & Loan Ass'n of Harrison, Ark. v. Anderson*, 681 F.2d 528, 533 (8th Cir. 1982).

where "there is no other adequate remedy in a court." 5 U.S.C. § 704. *Cathedral Sq. Partners Ltd. P'ship v. S.D. Hous. Dev. Auth.*, 679 F. Supp. 2d 1034, 1040 (D.S.D. 2009) *on reconsideration*, 875 F. Supp. 2d 952 (D.S.D. 2012). Thus, the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988); *accord Cent. Platte Natural Res. Dist. v. USDA*, 643 F.3d 1142, 1149 (8th Cir. 2011) ("Congress did not mean for the APA [] . . . to duplicate existing review mechanisms.") (citation omitted). As the Eighth Circuit has held, where there is an opportunity for judicial review under another statute, review under the APA is unavailable. *Defenders of Wildlife*, 882 F.2d at 1302-03.

The States already have a petition for review pending in the Sixth Circuit, where they raise the same challenges to the Clean Water Rule as they do here. The Sixth Circuit has confirmed that it will adjudicate that challenge. Accordingly, there is "an adequate remedy in a court," and the States' APA claims may not go forward. *Cf. Central Platte Natural Res. Dist.*, 643 F.3d at 1149 (affirming dismissal of APA claim where plaintiff had sought to simultaneously pursue Freedom of Information Act claim seeking the same relief); *Turner v. Sec'y of the U.S. Dept. of Housing and Urban Dev.*, 449 F.3d 536, 540 (3d Cir. 2006) (affirming that APA claim against agency was precluded where plaintiff had "adequate remedy" in prior suits she brought against her landlord); *Schaeffer v. U.S. Dept. of Educ.*, No. 4:05 CV 641 SNL, 2005 WL 3008516, at *7 (E.D. Mo. Nov. 9, 2005) (dismissing APA claim where plaintiff had three times pursued an alternative remedy in other suits).[6]

[6] As the American Farm Bureau Federation, American Petroleum Institute, National Association of Home Builders, and other petitioners before the Sixth Circuit concede in their petition for rehearing *en banc*, where there is jurisdiction in the courts of appeals under CWA Section

Because this Court lacks legal authority in this case, it must dissolve the preliminary injunction and dismiss the States' complaint.[7]

C. Review of the Clean Water Rule in multiple courts would be contrary to prudential limits on unnecessary duplicative litigation.

There are also sound prudential reasons for this Court to dismiss the States' claims here. The States already have a pending petition for review of the Rule in the Sixth Circuit and that court has determined that it has jurisdiction over such petition. Thus, if the present case were allowed to proceed, the States would simultaneously be pursuing the very same claims (and the same relief) in two federal courts, which would waste judicial and party resources and create the possibility of inconsistent results. Principles of judicial economy and comity among the courts counsel in favor of avoiding such duplicative litigation.

The Eighth Circuit has followed the Supreme Court in recognizing "a general policy that duplicative litigation in *federal* courts should be avoided." *Missouri ex rel. Nixon v. Prudential Health Care Plan Inc.*, 259 F.3d 949, 953 (8th Cir. 2001) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)) (emphasis in original). Allowing a party to pursue simultaneously the same claims against the same party in more than one court wastes the courts' time and resources and leads to piecemeal litigation. *Prudential*, 259 F.3d at 954 (limit on duplicative suits motivated by "reasons of wise judicial administration" and avoidance of "piecemeal litigation"); *Colorado River*, 424 U.S. at 817-18 (citations omitted) (same). Based on these principles, the Eighth Circuit, in *Prudential*, stated in no uncertain terms:

509(b)(1), "then it necessarily does *not* lie in the district courts under the APA." *In re EPA and Dep't of Def. Final Rule*, No. 15-3751(lead) Doc. 73 at 13-14 (emphasis in original).

[7] We explain in Section III, *infra*, that Plaintiffs' NEPA claim is also subject to exclusive appellate jurisdiction under section 509(b)(1).

"Plaintiffs may not pursue multiple federal suits against the same party involving the same controversy at the same time." 259 F.3d at 954. The court further found that the principles underlying avoidance of duplication apply even when the pending suits are in circuit and district courts:

> It makes little sense to proscribe district-district duplication but not district-circuit duplication, as both forms of duplication require the unnecessary expenditure of scarce federal judicial resources. Any form of duplication requires the federal judicial system (broadly speaking) to adjudicate two actions when one action will resolve the parties' controversy.

Prudential, 259 F.3d at 954.

Moreover, the Sixth Circuit is the only court able to provide a "comprehensive disposition of [the] litigation." *Colorado River*, 424 U.S. at 817. Numerous parties have petitions for review pending in the Sixth Circuit. The Sixth Circuit is the only court able to resolve all challenges to the Clean Water Rule in one proceeding. Thus, even if this Court concludes that the Sixth Circuit's jurisdictional decision is not binding per se, it should defer to the Sixth Circuit based on comity and judicial efficiency, dissolve the preliminary injunction, and dismiss the amended complaint.

II. The opinions of the Sixth Circuit and other district courts, holding that the Clean Water Rule is reviewable in the Sixth Circuit, are consistent with the text, structure, and purposes of CWA Section 509(b)(1) and should at least be given highly persuasive effect.

As explained above, the Sixth Circuit's decision must be controlling on this Court both in order for Section 2112(a) to function as designed and because APA review is not available where there is an adequate remedy in another court. The Court should dismiss the complaint on those grounds, and its analysis need not proceed any further. In any event, in addition to considering the legal effect of the Sixth Circuit's decision, this Court may also reconsider its prior jurisdictional ruling in light of the decisions of the Sixth Circuit and the district courts for the

Northern District of West Virginia and Southern District of Georgia and conclude, as those courts did, that only the United States Court of Appeals for the Sixth Circuit may entertain challenges to, and issue any preliminary or permanent relief respecting, the Clean Water Rule.

A. The Clean Water Rule falls squarely within Section 509(b)(1)(E) because it is an "other limitation" promulgated under CWA Section 301, 33 U.S.C. § 1311.

Section 509(b)(1)(E) provides for exclusive review of the Clean Water Rule because it is an EPA action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 [of the CWA]." 33 U.S.C. § 1369(b)(1)(E). The Rule is an "other limitation" because it is a restriction on those who discharge a pollutant into protected waters and those who issue permits, such as the States here. And the Rule was promulgated under Section 1311, which prohibits the discharge of any pollutant by any person to waters of the United States except as in compliance with law, 33 U.S.C. §§ 1311(a), 1362(7), (12). *See* 80 Fed. Reg. at 37,055 (citing, among other provisions, 33 U.S.C. § 1311 as "authority for this rule"); *In re EPA*, Doc. 72-2 at 10-11 n.4 (Attachment 1); *Georgia*, 2015 WL 5092568 at *2 (Attachment 3). By defining what waters are "waters of the United States," the Clean Water Rule implements the most fundamental restriction in the Act.

While the CWA does not define "other limitation," it does define "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into [waters of the United States], the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11). The Act therefore sets forth "other limitation" as an alternative type of limitation to "effluent limitation," both of which are governed by the judicial review provision of Section 509(b)(1)(E). *Id.* § 1369(b)(1)(E). As a matter of sound statutory construction, the term "other limitation" refers to restrictions under the

specified CWA sections that are *not* effluent limitations. *See Virginia Elec. & Power Co. v. EPA ("VEPCO")*, 566 F.2d 446, 449 (4th Cir. 1977) ("[W]e cannot assume that [Section 509(b)(1)(E)'s] inclusion [of the phrase 'other limitation'] was meaningless or inadvertent."); *see also ConocoPhillips Co. v. EPA*, 612 F.3d 822, 831 (5th Cir. 2010) ("We have jurisdiction over challenges to an agency's action that result[s] in 'other limitations' under the CWA, and coolant water intake regulations are deemed 'other limitations.'"); *Friends of the Everglades*, 699 F.3d at 1286 (citing Black's Law Dictionary, 1012 (9th ed. 2009), in recognizing that an "other limitation" is a "restriction").

"Other limitation" has also long been recognized as including restrictions other than numerical limitations. In *VEPCO*, the Fourth Circuit held that it had original jurisdiction under Section 509(b)(1)(E) to review EPA regulations that required consideration of certain information in selecting the location, design, construction, and capacity of cooling water intake structures regulated under the CWA. 566 F.2d at 448. As here, EPA had relied on 33 U.S.C. § 1311 as a basis for that regulation. *Id.* at 450. The *VEPCO* court concluded that it had jurisdiction, even though the regulations (as here) did not contain numerical limits or specific structural or locational requirements applicable to point source dischargers, but rather required consideration of certain technical information in the determination of applicable standards. *Id.* at 450. In rejecting the utility companies' argument that the regulations were not limitations, the Fourth Circuit stated that because the regulations "require[d] certain information to be considered in determining the best available technology for intake structures," they constituted "a limitation on point sources and permit issuers, for we construe that term as a restriction on the untrammeled discretion of the industry which was the condition prior to the passage of the statute." *Id.*

VEPCO is all the more relevant because the Eighth Circuit has followed its reasoning in asserting jurisdiction under Section 509(b)(1)(E) over EPA's correspondence with a United States Senator addressing certain regulatory requirements governing water treatment processes. In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), the court of appeals explained that EPA's statements "regarding the use of blending is an 'other limitation' because, as in *VEPCO*, it restricts the discretion of municipal sewer treatment plants in structuring their facilities." 711 F.3d at 866. The Eighth Circuit further observed that "[m]any of our sister circuits have adopted the *VEPCO* approach," by construing CWA Section 509(b)(1)(E) to apply to rules that restrict the discretion of dischargers. *Id.* (citations omitted). As noted by the Sixth Circuit, the Eighth Circuit adopted the *VEPCO* formulation of "limitation" when it held that subsection (E) applies if "entities subject to the CWA's permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes," *In re Dep't of Def*, Doc. 72-2 at 9 (Attachment 1), quoting *Iowa League of Cities*, 711 F.3d at 866; *see also Murray*, 2015 WL 5062506, at *4 (Attachment 3) (recognizing same).

The D.C. Circuit has also cited *VEPCO* in holding that it had original jurisdiction to hear a petition challenging EPA's Consolidated Permit Regulations, which do "not set any numerical limitations on pollutant discharge" but are a "set of procedures for issuing or denying [National Pollutant Discharge Elimination System] permits." *Natural Res. Def. Council*, 673 F.2d at 402. The court rejected the argument that because the regulations were "general" rules rather than technology-based rules, they did not constitute "effluent limitation[s] or other limitation[s]" under Section 509(b)(1)(E). *Id.* at 404. *See also Nat'l Wildlife Fed'n. v. EPA*, 949 F. Supp. 2d 251, 256-57 (D.D.C. 2013) (citing Section 509(b)(1)(E) and *VEPCO* in concluding that the district court lacked jurisdiction to review an EPA regulation pertaining to what information

could or could not be considered in issuing a general National Pollutant Discharge Elimination System permit for vessels).

In its August 27, 2015 order, this Court acknowledged *Iowa League of Cities* and *VEPCO* and noted that the Rule "changes what constitutes waters of the United States." Doc. 70 at 4. However, the Court applied an overly constrained construction of Section 509(b)(1)(E) when it concluded that the Rule "imposes no 'other limitation'" because "the States have exactly the same discretion to dispose of pollutants into waters of the United States after the Rule as before[.]" *Id.*. To the contrary, consistent with the Eighth Circuit's interpretation of that provision in *Iowa League of Cities*, and the Sixth Circuit's conclusion, by defining what waters require permits for discharges of pollutants, the regulatory definition of waters of the United States—including the Clean Water Rule—qualifies as an "other limitation."

The regulatory definition of waters of the United States in the Rule qualifies as an "other limitation" in two respects: it restricts the ability of property owners who are operating a potential point source into covered waters, and it requires authorized states to process Section 402 permits for covered waters.

As to property owners, the CWA prohibits the "discharge of any pollutant"—defined as "any addition of any pollutant to *navigable waters* from any point source"—unless conducted in compliance with the Act's provisions. 33 U.S.C. §§ 1311(a) and 1362(12) (emphasis added). "[N]avigable waters" is defined to include the "waters of the United States," 33 U.S.C. § 1362(7), but "waters of the United States" is not further defined in the statute. The scope of waters of the United States is central to the prohibition in 33 U.S.C. § 1311(a) and, as a result, to the National Pollutant Discharge Elimination System ("NPDES") (CWA Section 402) permit program and other CWA programs that regulate point source discharges. *See, e.g.*, 33 U.S.C. §§

1311(a), 1342(a), 1344(a); 40 C.F.R. § 122.1(b)(1) (providing that the Section 402 permit program "requires permits for the discharge of 'pollutants' from any 'point source' into 'waters of the United States,'" and "[t]he terms 'pollutant,' 'point source' and 'waters of the United States' are defined at [40 C.F.R.] § 122.2").

The Rule defines the term "waters of the United States," with some waters falling within the definition and some falling outside the definition. 80 Fed. Reg. at 37,055-60. For those waters that fall within the reach of the Rule and for point sources within those waters, the Rule operates as a restriction on the use of those point sources. Thus, property owners who are operating a point source are restricted in their ability to discharge pollutants to waters without constraint as a direct result of the Clean Water Rule and the requirements of the CWA. *See In re Dep't of Def.* Doc. 72-2 at 10 (Attachment 1) ("These restrictions, of course, are presumably the reason for petitioners' challenges to the Rule.").

Further, the States essentially concede that the Rule is a restriction or limitation on states as permit-issuers under CWA Section 402, 33 U.S.C. § 1342. States that have received authorization for the Section 402 NPDES permitting program must process permits for waters within their states that meet the Rule's definition of "waters of the United States." *Cf. VEPCO*, 566 F.2d at 448; *Natural Res. Def. Council*, 673 F.2d at 405 (holding that permit regulations were "a limitation on point sources and permit issuers").

In their motion for a preliminary injunction, the States acknowledge that they have "permitting and oversight obligations" associated with the definition of waters of the United

States. Doc. 33 at 10.[8] As the Sixth Circuit recognized, the Rule "alter[s] permit issuers' authority to restrict point-source operators' discharges into covered waters." *In re Dep't of Def.*, Doc. 72-2 at 10 (Attachment 1); *see also Georgia*, 2015 WL 5092568, at *2 (Attachment 4) ("Indeed, that is, in part, why the Plaintiffs are suing, and it is part of the harm of which they complain.").

As the *Murray* decision correctly explains, jurisdiction under CWA Section 509(b)(1)(E) does not turn on a comparison of the Rule with the pre-existing regulatory definition of waters of the United States. Instead, what matters is the Rule's effect on regulated entities and permit issuers compared to the absence of any regulation whatsoever. In *Murray*, the court rejected the plaintiff's argument that it "was already regulated under the prior rule." *Murray*, 2015 WL 5062506, at *6 (Attachment 3). The court explained that under *VEPCO*, 566 F.2d at 450, Section 509(b)(1)(E) does not apply "only to cases in which the affected industry enjoyed unfettered discretion prior to the issuance of the challenged rule." *Murray*, 2015 WL 5062506, at *6 (Attachment 3). The *Murray* court's reading of *VEPCO* is correct; there, the Fourth Circuit found it sufficient for purposes of Section 509(b)(1)(E) that the challenged regulation in question served as a "limitation on point source[] [dischargers] and permit issuers" and as "a restriction on the untrammeled discretion of the industry *which was the condition prior to the passage of the [CWA]*." *VEPCO*, 566 F.2d at 450 (emphasis added).

Although the Rule is definitional, it still qualifies as an "other limitation" within the meaning of the statute and binding Eighth Circuit precedent. "The Rule operates as a limitation

[8] Though the Agencies disputed the States' allegations of irreparable harm, it is indisputable that the States are required to consider the scope of waters of the United States in their implementation of the CWA.

or restriction on permit issuers and people who would discharge into the bodies of water the Rule now includes as waters of the United States. The [waters of the United States] rule accomplishes significant limiting and significant restricting even if accomplished by way of defining." *Georgia*, 2015 WL 5092568, at *2 (Attachment 4). *Cf. Natural Res. Def. Council*, 822 F.2d at 112-13 (reviewing EPA's regulatory definition of "new source" for purposes of National Pollutant Discharge Elimination System program permitting under 509(b)(1)(E)). The Sixth Circuit agreed with the *Georgia* court, citing to *VEPCO* and *Iowa League of Cities* as examples of cases where Section 509(b)(1)(E) jurisdiction applied to actions that were "not self-executing" but nonetheless constituted a "binding limitation." *In re Dep't of Def.* Doc. 72-2 at 8-9 (Attachment 1). Accordingly, this Court should reconsider its conclusion that the Rule imposes no "other limitation" because it is definitional. Like the plaintiffs in *Murray* and *Georgia*, the States here "seek review of the Administrator's action in promulgating a limitation under section 1311." *Georgia*, 2015 WL 5092568, at *2 (citation omitted) (Attachment 4).

In its decision, *In re Dep't of Def.*, Doc. 72-2 at 9 (Attachment 1), the Sixth Circuit cited to *Iowa League of Cities*, in which the Eighth Circuit observed that "the Supreme Court has recognized a preference for direct appellate review of agency action[.]" 711 F.3d at 861-62 (citing, *inter alia*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985)). *Cf. Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980) (observing, in the context of a final action by EPA under the Clean Air Act, that "[t]he most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal."). However, that does not mean that Section 509 is without limits. In its August 27, 2015 order, the Court expressed the concern that "[i]t is difficult to imagine any action that EPA might take in the promulgation of a rule that is not either definitional or regulatory." Doc. 70 at 5. *See*

also id. at 5 n.18 ("Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act[,]" quoting *Nat'l Cotton Council*, 553 F.3d at 933 (citation omitted)). But meaningful dividing lines exist. The phrase "other limitation" must relate to the sections of the CWA specifically identified in Section 509(b)(1)(E): Sections 301, 302, 306, or 405 [33 U.S.C. §§ 1311, 1312, 1316, or 1345].

For example, just within the Eighth Circuit, district courts have regularly reviewed EPA actions taken in connection with CWA Section 303, 33 U.S.C. § 1313. *See, e.g., WaterLegacy v. EPA*, 300 F.R.D. 332 (D. Minn. 2014) (reviewing an EPA approval of State-adopted water quality standards); *El Dorado Chem. Co. v. EPA*, 960 F. Supp. 2d 838 (W.D. Ark. 2013), *aff'd*, 763 F.3d 950 (8th Cir. 2014) (challenging an EPA decision denying proposed changes to a State's water quality standards); *Mo. Coal. for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903 (W.D. Mo. 2012) (reviewing EPA's approval of a State's water quality standards); *Thomas v. EPA*, No. C06-0115, 2007 WL 4439483 (N.D. Iowa Dec. 17, 2007) (reviewing EPA's partial approval of a State's list of waters not meeting water quality standards); *Minn. Ctr. for Envtl. Advocacy v. EPA*, No. CIV03-5450, 2005 WL 1490331 (D. Minn. June 23, 2005) (reviewing EPA's approval of State's total maximum daily load for specified waters). District courts may also review challenges to administrative compliance orders issued by EPA pursuant to CWA Section 309(a), 33 U.S.C. § 1319(a). *Sackett v. EPA*, 132 S. Ct. 1367 (2012). EPA's rules implementing Section 404 are also reviewable in district court under the Administrative Procedure Act. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459 (D.C. Cir. 2006) (affirming district court review of rule promulgated by EPA and the Corps of Engineers pertaining to dredge or fill material under CWA Section 404). And EPA's decision to veto a permit issued under CWA Section 404, 33 U.S.C. § 1344, is similarly reviewable in

district court. *See, e.g.*, *Mingo Logan Coal Co. v. EPA*, 70 F. Supp. 3d 151 (D.D.C. 2014). All of these decisions are consistent with the Agencies' view of the limits of CWA Section 509(b)(1).

Indeed, there can be no dispute that most final actions that EPA takes under the CWA are subject to challenge in district courts because they fall outside the scope of CWA Section 509(b)(1). But with respect to the Clean Water Rule and similar comprehensive and permit-centric regulations issued by EPA, it is critical that courts give effect to "'the congressional goal of ensuring prompt resolution of challenges to EPA's actions[.]'" *Georgia*, 2015 WL 5092568, at *3 (Attachment 4) (quoting *Murray* at 16; *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980) (*per curiam*). *See also In re Dep't of Def.*, Doc. 72-2 at 6 (Attachment 1) ("Whether subject matter jurisdiction lies [in the circuit court] is governed by the intent of Congress.") (citing *Fla. Power & Light*, 470 U.S. at 746). As the Sixth Circuit recognized, "[t]o rule that Congress intended to provide direct circuit court review of [individual permitting] actions but intended to exclude from such review the definitional Rule on which the process is based, would produce, per *E.I. du Pont*, a 'a truly perverse situation.'" *In re Dep't of Def.*, Doc. 72-2 at 10 (Attachment 1) (citing *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112, 136 (1977)).[9]

In sum, as the Southern District of Georgia court aptly concluded, the "undeniable and

[9] *E.I. du Pont* considered whether Section 509(b)(1) applied to the review of EPA's promulgation of nationally applicable effluent limitations, by regulation, for classes of sources, or whether it applied only to source-specific effluent limitations and variances that dictate the limits of individual conduct. The Court held that EPA's action fell within Section 509(b)(1)(E) because EPA had "promulgat[ed] an effluent limitation for existing point sources under [Section] 301." 430 U.S. at 136. It is clear that jurisdiction to review EPA's issuance or denial of individual permits that contain effluent limitations lies in the courts of appeals, and the Court stressed a pragmatic interest in determining the extent of that jurisdiction: the power to review individual permit decisions necessarily encompasses the power to review the basic rules that control those decisions. *Id.*

inescapable effect" of a rule comprehensively defining waters of the United States "is to restrict pollutants and subject entities to the requirements of the [CWA's] permit program."[10] *Georgia*, 2015 WL 5092568, at *2 (Attachment 4); *see also Murray*, 2015 WL 5062506, at *5 (Attachment 3) ("Here, there is no dispute that the Clean Water Rule will have an impact on Murray's permitting requirements."). The very essence of defining what waters are regulated under the CWA is to impose restrictions on permit writers and dischargers of pollutants into such waters.

Accordingly, this Court's prior order was clearly erroneous, and the Court should conclude that the Sixth Circuit has exclusive jurisdiction to review the Rule under Section 509(b)(1)(E).

B. The Clean Water Rule falls within Section 509(b)(1)(F) because it is a regulation that governs the issuance of NPDES permits.

Section 509(b)(1)(F) provides for exclusive review in the courts of appeals of EPA action "in issuing or denying any permit under section 1342 [Section 402 of the CWA]." 33 U.S.C. § 1369(b)(1)(F). This Court correctly explained that this provision encompasses actions "functionally similar to the denial or issuance of a permit." Doc. 70 at 4 n.12 and 5 (citing *Crown Simpson*, 445 U.S. at 196[11]; *Iowa League*, 711 F.3d at 862; *Friends of the Everglades*, 699 F.3d

[10] The *Georgia* court thus distinguished the Clean Water Rule from the rule at issue in *Friends of the Everglades*, in which the Eleventh Circuit concluded that a rule *excluding* certain water conveyances from NPDES permitting requirements "impose[d] no restrictions on entities engaged in water transfers." *Georgia*, 2015 WL 5092568, at *2 (quoting *Friends of the Everglades*, 699 F.3d at 1286).

[11] In *Crown Simpson*, the Supreme Court held that Section 509(b)(1)(F) vested jurisdiction in the courts of appeal to review "EPA's action denying a variance and disapproving effluent restrictions contained in a permit issued by an authorized state agency." 445 U.S. at 194. The court of appeals had concluded that EPA's action in disapproving a permit issued by a *State* was not a decision by *EPA* "issuing or denying" a permit under Section 509(b)(1)(F). 445 U.S. at

at 1288; and *Nat'l Cotton Council*, 553 F.3d at 933). But the Court clearly erred in concluding that "the Rule has at best an attenuated connection to any permitting process." Doc. 70 at 5.

As the United States District Court for the Northern District of West Virginia explained: "[I]t is clear that the Clean Water Rule effectively requires Murray to obtain additional permits, and it therefore falls within the scope of § 509(b)(1)(F)." *Murray*, 2015 WL 5062506, at *6 (Attachment 3). Here again, the fundamental question is not whether the Rule requires more or fewer permits compared to the predecessor regulation or practice. Rather, it is whether the Rule changes the permitting requirements for would-be dischargers compared to no regulation at all. *VEPCO*, 566 F.2d at 450. The Rule defines what aquatic features fall within, and outside, the statutory term "waters of the United States," and thereby changes the circumstances in which some would-be dischargers must, or need not, seek a permit under the CWA.

In *Iowa League of Cities*, the Eighth Circuit stated that "the Supreme Court has interpreted broadly the direct appellate review provision in CWA section 509(b)(1)(F)." 711 F.3d at 862. Both the Northern District of West Virginia in *Murray* and the Southern District of Georgia in *Georgia* noted that the Sixth Circuit—the court assigned to resolve all petitions for review of the Rule, including the threshold question of subject matter jurisdiction—is consistent with the Supreme Court in "constru[ing] the appellate jurisdiction provided by § 509(b)(1)(F) broadly." *Murray*, 2015 WL 5062506, at *5 (Attachment 3) (describing *Nat'l Cotton Council*).

---

196. In reversing the court of appeals, the Supreme Court rejected that narrow reading of Section 509(b)(1)(F), ruling instead that because "the precise effect of [EPA's] action is to 'den[y]' a permit within the meaning of § 509(b)(1)(F)," that provision applied and jurisdiction was exclusively in the courts of appeals. *Id.* The Court rejected the formalistic approach taken by the court of appeals, where "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-97.

See also Georgia, 2015 WL 5092568, at *1 (Attachment 4) ("The Sixth Circuit . . . has taken a broader approach to § 1369(b)(1)(F)[] and found that jurisdiction was appropriate in the Court of Appeals when the rule at issue regulated permitting procedures but did not deal with the issuance or denial of a particular permit.") (citing *Nat'l Cotton Council*, 553 F.3d at 933).[12] In *National Cotton Council*, petitioners challenged a rule exempting certain applications of pesticides from the CWA Section 402 NPDES permit program. The Sixth Circuit found the rule to fall within CWA Section 509(b)(1)(F) because it "regulates the [underlying] permitting procedures." *Nat'l Cotton Council*, 553 F.3d at 933.[13] Similarly, by defining the statutory term "waters of the United States," the Clean Water Rule regulates and is central to CWA Section 402 permitting procedures.

In its decision confirming its jurisdiction to review the Clean Water Rule, the Sixth Circuit followed its earlier precedent in *National Cotton Council* and held that the Clean Water Rule is an underlying permitting regulation. *In re EPA*, Doc. 72-2 at 11-16, 19. But *National Cotton Council* is merely one example of circuit courts applying the Supreme Court's opinion in *Crown Simpson* to give Section 509(b)(1) a "practical rather than a cramped construction." *Natural Res. Def. Council*, 673 F.2d at 405. *See also In re Dep't of Def.*, Doc. 72-2 at 30

[12] The Southern District of Georgia did not reach the question whether the Rule falls within the scope of CWA Section 509(b)(1)(F), having found that Section 509(b)(1)(E) applies. *See Georgia*, 2015 WL 5092568, at *1 (Attachment 4).

[13] In *Friends of the Everglades* and *Northwest Environmental Advocates*, the courts concluded that the rules at issue were not within the jurisdiction of Section 509(b) because they were purely exemptions from the CWA permit program. *Friends of the Everglades*, 699 F.3d at 1284; *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1018 (9th Cir. 2008). In contrast here, rather than exempting activities from regulation under the NPDES permitting program, the Clean Water Rule identifies what water bodies *will* require CWA permits when pollutants are discharged into them. In this way, the Rule constitutes both a "limitation" under Section 509(b)(1)(E) and an underlying permitting regulation under Section 509(b)(1)(F).

(Attachment 1) (stating that *National Cotton Council* is neither unique nor divergent from the predominant view of other circuits) (Griffin, J., concurring).

Another is *American Mining Congress v. EPA*, where the Ninth Circuit exercised original jurisdiction in reviewing an EPA stormwater discharge rule that excluded discharges from certain inactive mines from NPDES permitting. 965 F.2d 759, 763 (9th Cir. 1992). The court concluded that Section 509(b)(1)(F) "allows us to review the *regulations governing the issuance of permits* under section 402 . . . as well as the issuance or denial of a particular permit." *Id.* (emphasis added). Indeed, the Ninth Circuit has long relied on Section 509(b)(1)(F) in finding it has jurisdiction to review NPDES permitting regulations. *See, e.g., Natural Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (rule exempting discharges of oil and gas construction activities from NPDES permitting); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 843 (9th Cir. 2003) (rule specifying which municipal separate storm sewer system and stormwater discharges are or are not subject to NPDES permitting); *Natural Res. Def. Council*, 966 F.2d 1292, 1296-97, 1304-06 (9th Cir. 1992) (rule exempting from NPDES permitting requirements various types of "light industry," construction sites less than five acres in size, and certain oil and gas activities).

Likewise, other courts of appeals have exercised original jurisdiction over challenges to regulations governing NPDES permitting. The Second Circuit exercised original jurisdiction to hear consolidated challenges to EPA's Concentrated Animal Feeding Operation ("CAFO") Rule, which set forth NPDES permitting requirements, including provisions requiring CAFOs of a certain size to seek a permit, provisions setting forth a process to allow certain CAFOs to be exempt from permitting, and "the types of discharges subject to regulation." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 495-98, 504-506 (2d Cir. 2005). And the Fifth Circuit more

recently considered consolidated challenges to the CAFO Rule that EPA promulgated following the Second Circuit's remand in *Waterkeeper*. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 749-51 (5th Cir. 2011).

As these circuit court decisions demonstrate, applying a practical construction to Section 509(b)(1)(F) allows for the "clear and orderly process for judicial review" intended by Congress, *see* H.R. Rep. No. 92-911, at 136 (1972), where parties may challenge not only the grant or denial of a permit, but also EPA's rules that govern the Section 402 National Pollutant Discharge Elimination System permitting process.[14]

Here, the Clean Water Rule defines what aquatic features fall within, and outside, the statutory term "waters of the United States," and thereby identifies the circumstances in which some would-be dischargers must, or need not, obtain a permit under the CWA. The Rule is thus comparable to the regulations at issue in cases in which the underlying permitting regulations were determined to be reviewable under Section 509(b)(1)(F).

III. The Sixth Circuit Court of Appeals has exclusive jurisdiction over all the States' challenges to the Clean Water Rule, including their NEPA claim.

Although the Sixth Circuit's ruling does not directly address NEPA, the States' NEPA claim should be dismissed because jurisdiction to review that claim is subject to Section 509 as well. A special statutory review provision that governs designated agency decisions is presumed to be exclusive over more general review provisions. *Block v. N.D.*, 461 U.S. 273, 285 (1983); 5 U.S.C. § 703 (prescribing "the special statutory review proceeding relevant to the subject matter in a court specified by statute" as default for judicial review); *Cal. Save Our Streams Council,*

[14] In the Sixth Circuit's decision regarding jurisdiction to review the Rule, Judge McKeague noted "a uniform trend of the instructive case law" that has applied a broad reading of Section 509(b), and that "Congress has not moved to amend the provision or otherwise take 'corrective' action." *In re Dep't of Def.* Doc. 72-2 at 17 (Attachment 1).

Inc. v. Yeutter, 887 F.2d 908, 912 (9th Cir. 1989); *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979). Therefore, the presumptive availability of district court review over NEPA claims under the APA is irrelevant; where a special review provision applies, it takes precedence. *Bond*, 603 F.2d at 935; *Yeutter*, 887 F.2d at 912; *Defenders of Wildlife*, 882 F.2d at 1301.

A contrary holding would thwart the policies of centralized jurisdiction, which are to avoid piecemeal litigation and to encourage the prompt resolution of challenges to agency actions. *See Bond*, 603 F.2d at 936 (rejecting district court's jurisdiction over NEPA claim where "coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts."); *Envtl. Defense Fund v. EPA*, 485 F.2d 780, 782-83 (D.C. Cir. 1973) (district court review of NEPA challenge to FIFRA order would defeat policy of FIFRA "to insure speedy resolution of the validity of EPA determinations").

NEPA claims in particular, when they are based on agency actions subject to special statutory review, do not warrant independent review in the district courts. NEPA contains no independent cause of action or jurisdictional provision, and a plaintiff must rely on the APA to bring a NEPA claim. *Friends of the Norbeck*, 661 F.3d at 973. For APA claims, de novo fact-finding is neither required nor appropriate. *See Fla. Power & Light*, 470 U.S. at 744 (noting "factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking"); *Yeutter*, 887 F.2d at 912 (district court lacked jurisdiction to review NEPA challenge to FERC license where courts of appeal "are properly constituted to hear all relevant arguments"); *Envtl. Defense Fund*, 485 F.2d at 782-83 ("[I]ssues concerning NEPA statements can be developed in full before the administrative agency, without need for separate factual development in the district court."). Moreover, the Sixth Circuit has the power to order

complete relief for any violation of NEPA that is found, giving the States an "adequate"—and arguably superior, given the greater reach of any order—remedy in that forum.

The States' allegations of procedural defects in the Environmental Assessment prepared by the Corps of Engineers and the Finding of No Significant Impact signed by the Assistant Secretary for Civil Works do not alter this analysis. The States' lawsuit seeks to invalidate the Clean Water Rule, and the Environmental Assessment and Finding of No Significant Impact are challenged only because of their relationship to that Rule.[15] *See* Doc. 44 (Am. Compl.) ¶¶ 2, 67-68, 69, 81, Prayer for relief A.-D. The Rule, as the Sixth Circuit has confirmed, is action of a kind designated for exclusive appellate review under the CWA. The States' characterization of the action they challenge does not remove it from the operation of Section 509. *Yeutter*, 887 F.2d at 912 (exclusive appellate jurisdiction over NEPA challenge to FERC order where "although appellants seek to characterize the proceedings as an attack on the Forest Service's actions, it is clear that the suit is an attempt to restrain the licensing procedures authorized by FERC"); *Sutton v. U.S. Dep't. of Transp.*, 38 F.3d 621, 626 (2d Cir. 1994) (plaintiffs' characterization of claim as a NEPA violation "does not change the fact that the substantive claims alleged in their complaint are based in substantial part on the Federal Aviation Administration's determination [for which Aviation Act prescribed exclusive review]").

[15] Indeed, the nature of the harms the States assert—to their sovereign regulatory authority, administrative budgets, and ability to accomplish infrastructure projects—confirms that the Rule, not the alleged deficiencies in the Corps' NEPA process, is the gravamen of the States' action. *See* Doc. 33 at 10, 23. The interests the States seek to vindicate also are not sufficiently related to impacts on the physical environment to fall within NEPA's zone of interests. *See Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002) (same for lessee asserting economic harms); *Cent. S.D. Co-op. Grazing Dist. v. Sec'y of U.S. Dept. of Agric.*, 266 F.3d 889, 897 (8th Cir. 2001) (grazing association not within zone of interests).

The fact that the States have named the Department of the Army and Army Corps of Engineers, in addition to the EPA, as defendants also cannot supersede Section 509's statutory review regime for specified EPA actions. Because the Environmental Assessment and Finding of No Significant Impact were prepared in support of the rulemaking process for the Rule, challenges based on those documents fall within Section 509's ambit regardless of the agency responsible for them. *See Yeutter*, 887 F.2d at 912 (where conditions imposed by Forest Service would have no significance outside FERC licensing process, fact that Forest Service was named as defendant did not defeat statute conferring exclusive appellate jurisdiction over FERC orders). A contrary result would be inconsistent with the policies of the CWA's special review provision. *Id.* ("The point of creating a special review procedure in the first place is to avoid duplication and inconsistency."); *see Nat'l Parks Conservation Ass'n*, 998 F.2d 1523, 1529 (10th Cir. 1993) ("[I]f the BLM actions could not be directly reviewed by us while the FAA actions could, the bifurcated suit could result in inconsistency, duplication, and delay."). In any event, an action "does not cease to be 'action of the Administrator' merely because it was adopted and negotiated in conjunction with the Secretary of the Army and the Corps . . . ." *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1328-29 (9th Cir. 1992); 40 C.F.R. § 1501.3(b) (agency may prepare EA "at any time in order to assist agency planning and decisionmaking").[16]

The States' NEPA claim, like its other claims, must be dismissed for lack of jurisdiction.

[16] As the Agencies explained in their opposition to the States' motion for a preliminary injunction, Doc. 66 at 15-16, the States have failed to state a claim with respect to NEPA. With two exceptions not relevant here, the CWA specifically exempts actions by EPA's Administrator from NEPA's requirements. 33 U.S.C. § 1371(c)(1). The Rule is an "action of the Administrator" for which NEPA was not required, and the Corps' involvement in promulgating the Rule does not alter that conclusion. Whether or not the States have stated a cause of action is an issue for the Sixth Circuit to resolve.

CONCLUSION

This Court lacks subject matter jurisdiction. Accordingly, the preliminary injunction entered by the Court on August 27, 2015 must be dissolved and the States' amended complaint must be dismissed.

Dated: March 3, 2016

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

/s/ *Martha C. Mann*
DANIEL R. DERTKE
AMY J. DONA
MARTHA C. MANN
JESSICA O'DONNELL
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
T: (202) 514-2664 (Mann)
F: (202) 514-8865
daniel.dertke@usdoj.gov
amy.dona@usdoj.gov
martha.mann@usdoj.gov
jessica.o'donnell@usdoj.gov

STACEY BOSSHARDT
Natural Resources Section
stacey.bosshardt@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2016, I caused a true and correct copy of the foregoing to be served via the court's CM/ECF system on all registered counsel.

/s/ *Martha C. Mann*
United States Department of Justice